Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAM A. BRANDT, JR., as Trustee of the Chapter 7 Estate of Southeast Banking Corporation,

Petitioner,

v.

FIRST UNION CORPORATION, a North Carolina corporation and FIRST UNION NATIONAL BANK OF FLORIDA, a national banking association, and FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After federal regulators closed two Florida banks and First Union purchased the banks' assets from the FDIC, the trustee in bankruptcy for the banks' parent holding company sued First Union in tort and contract, based upon First Union's pre-seizure conduct. No government agency is named as a defendant in the complaint, and none of the claims are based upon governmental acts that would be protected by statutory or common-law immunity. The Eleventh Circuit nonetheless ruled that the trustee's state-law claims against First Union were barred. The question presented is:

In light of this Court's recent decisions restricting federal common lawmaking powers, can governmental immunity be extended, as a matter of federal common law, to a private party that has not acted as an agent of the federal government, thereby barring a plaintiff's state-law causes of action?

LIST PURSUANT TO RULE 29.6

The petitioner has no parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

LIST PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. The Parties and the Dismissed Complaint 2

B. Proceedings Below 4

REASON FOR GRANTING THE PETITION 7

The Question Presented is Important 8

A. *The Eleventh Circuit's rules of decision.* 8

B. *Judicial restraint in the creation of federal common law.* 13

1. *Constraints on the federal displacement of state law.* 13

TABLE OF CONTENTS
(Continued)

PAGE

2. *Federal common law and matters of private interest.* 16

C. *The Eleventh Circuit's creation of federal common law to displace a state-law cause of action departs from this Court's controlling legal standard and presents a question of great importance to federal-state relations.* 21

CONCLUSION 26

TABLE OF AUTHORITIES

PAGE

CASES

Atherton v. Federal Deposit Insurance Corporation
--- U.S. ---, 117 S. Ct. 666 (1997) 7

Bank of America National Trust and Savings Association v. Parnell
352 U.S. 29 (1956) 17

Barr v. Matteo
360 U.S. 564 (1959) 11, 22

Boyle v. United Technologies Corporation
487 U.S. 500 (1988) 14

Carley v. Wheeled Coach
991 F.2d 1117 (CA3),
cert. denied, 510 U.S. 868 (1993) 16

Citibank, N.A. v. Data Lease Financial Corp.
828 F.2d 686 (CA11 1987) 11

Clearfield Trust Co. v. United States
318 U.S. 363 (1943) 13

D'Oench, Duhme & Co., Inc. v. FDIC
315 U.S. 447 (1942) 20

Doe v. McMillan
412 U.S. 306 (1973) 11

Erie Railroad Co. v. Tompkins
304 U.S. 64 (1938) 13

TABLE OF AUTHORITIES
(Continued)

PAGE

FDIC v. Irwin
916 F.2d 1051 (5th Cir.1990) 6, 8

Golden Pacific Bancorp v. Clarke
837 F.2d 509 (CA D.C.),
cert. denied, 488 U.S. 890 (1988) 8

Gregoire v. Biddle
177 F.2d 579 (CA2 1949) 22

Gutierrez de Martinez v. Lamagno
--- U.S. ---, 115 S. Ct. 2227 (1995) 12

Hess v. FDIC
65 U.S.L.W. 3085 (Jan. 21, 1997) 20

In re Southeast Banking Corporation
93 F.3d 750 (CA11 1996) 10

Mangold v. Analytic Services, Incorporated
77 F.3d 1442 (CA4 1996) 16

Miree v. DeKalb County, Georgia
433 U.S. 25 (1977) 16

Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.
83 F.3d 1317 (CA11 1996) (*en banc*),
vacated and remanded, sub nom.
Hess v. FDIC
65 U.S.L.W. 3085 (Jan. 21, 1997) 20

TABLE OF AUTHORITIES
(Continued)

PAGE

National Bank v. Commonwealth of Kentucky
76 U.S. (9 Wall.) 353 (1869) 19

O'Melveny & Myers v. Federal Deposit Insurance Corporation
512 U.S. 79, 114 S. Ct. 2048 (1994) 14, 21

Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency
34 F.3d 753 (CA9 1994) 11

Texas Industries, Inc. v. Radcliff Materials
451 U.S. 630 (1981) 13, 25

United States v. Gaubert
499 U.S. 315 (1991) 9, 11

United States v. Kimbell Foods, Inc.
440 U.S. 715 (1979) 14

United States v. Lopez
— U.S. —, 115 S. Ct. 1624 (1995)..... 25

United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)
467 U.S. 797 (1984) 10

United States v. Smith
499 U.S. 160 (1991) 12

Wallis v. Pan American Petroleum Corporation
384 U.S. 63 (1966)..... 17

TABLE OF AUTHORITIES
(Continued)

PAGE

Westfall v. Erwin
484 U.S. 292 (1988) 11, 12, 22

Wolfe v. American Savings and Loan Association of Florida
539 So. 2d 606 (Fla. Dist. Ct. App. 1989) 11

STATUTES

28 U.S.C. § 2674 8

28 U.S.C. § 2679 12

28 U.S.C. § 2679(d) 12

28 U.S.C. § 2680(a) 1, 8

28 U.S.C. § 1254(1) 1

688.001, Fla. Stat. (1993) 4

RULES

Rule 12(b)(6), Fed. R. Civ. P. 11

OTHER AUTHORITIES

Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation,*
144 U. PA. L. REV. 1245 (1996) 19, 25

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner William A. Brandt, Jr., as Chapter 7 Trustee of the Estate of Southeast Banking Corporation, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-5a) is reported at 93 F.3d 750 (CA11 1996). The opinion of the District Court (App., *infra*, 5a-13a) is unreported.

JURISDICTION

The court of appeals entered its judgment on September 3, 1996 (App., *infra*, 14a-15a), and denied rehearing on November 8, 1996 (App., *infra*, 16a-17a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 2680(a):

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. Section 2679(b)(1):

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

STATEMENT

A. The Parties and the Dismissed Complaint

The petitioner before the Court is William A. Brandt, Jr., as Trustee of the Chapter 7 bankruptcy estate of Southeast Banking Corporation (Southeast). The respondents are First Union Corporation, its wholly-owned subsidiary First Union National Bank of Florida (collectively, First Union) and the FDIC, which was an intervenor below.

Beset with losses stemming from a weakened local real estate market and other economic conditions, Southeast launched efforts in 1991 to explore a merger or other business combination with a strong financial institution. (App., *infra,* 21a).[1] In March of 1991, Southeast and First

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[1] The facts stated in this petition are taken from the allegations in the dismissed complaint, all of which must be accepted as true on review of the order granting the motion to dismiss.

Union entered into an agreement that contemplated a possible merger or other business combination. Toward that end, Southeast afforded First Union access to confidential and proprietary information. (App., *infra*, 20a-22a). The information obtained by or disclosed to First Union was protected by the agreement's "confidentiality covenant," under which such information was to be used "solely for the purpose of evaluating a possible transaction" with Southeast. (App., *infra*, 21a-22a). The agreement affords Southeast additional protection in the form of a "standstill covenant," which barred First Union from taking certain actions, *e.g.*, acquiring a significant interest in Southeast or hiring key employees, except in the context of a consensual transaction with Southeast. (App., *infra*, 22a-23a).

First Union breached the agreement by using the confidential information it obtained from Southeast to exert influence on federal regulators in order to bring about a rapid, federally-assisted resolution of Southeast's two subsidiary banks, all without Southeast's knowledge or consent. First Union disseminated public statements that further undermined public confidence in Southeast, thus making it more difficult for Southeast to surmount its economic problems without the type of resolution First Union sought. Specifically, First Union used confidential information innocently provided by Southeast in reliance on the confidentiality agreement, presenting both that information and First Union's own subjective analysis of the information to federal regulators in such a way as to further its own undisclosed objective of causing a takeover of the two Southeast banks. As a result of First Union's persistent and persuasive efforts, the regulators became increasingly intransigent and resistant to efforts by Southeast to dispose of certain of its assets at a profit or find other solutions to its financial problems, and finally closed the banks in September of 1991. The FDIC was appointed as receiver, and immediately sold the assets of the banks to First Union. Southeast consequently sustained economic injury that led immediately and directly to its bankruptcy filing and the resulting loss of hundreds of millions of dollars to its creditors, bondholders, and shareholders. (App., *infra*, 18a, 24a-27a).

B. Proceedings Below

Brandt filed a complaint against First Union in Florida state court, alleging the following state-law claims: breach of the confidentiality covenant; breach of the standstill covenant by use of confidential information and records to acquire Southeast or some portion of its assets except in a friendly transaction; breach of Florida's Uniform Trade Secrets Act, § 688.001, *et seq.*, Florida Statutes (1993); trade slander for First Union's false and defamatory public statements about Southeast and its subsidiaries; breach of fiduciary duty arising out of the fiduciary relationship created by the agreement and First Union's commitment of confidentiality; fraud in the inducement based upon First Union's concealed intent to use the information obtained from Southeast under false premises to cause its demise; negligent misrepresentation of First Union's true intent in entering into the agreement; promissory estoppel based upon First Union's promises to Southeast; breach of the implied covenant of good faith and fair dealing arising out of the agreement; and tortious interference with business relationships. (App., *infra,* 33a-50a). The FDIC intervened in the action and secured a removal to federal district court. (App., *infra,* 3a).

Accepting the allegations in the complaint as true for the purpose of ruling on First Union's motion to dismiss, the district court characterized Brandt's claim in this way:

> First Union never intended to abide by the terms of the agreement. It wanted to acquire Southeast Bank, but not by a friendly merger. Instead, First Union hoped to drive Southeast Bank into insolvency, pressure the FDIC to intervene by disclosing the confidential information it obtained from Southeast, and then bid for Southeast Bank's assets while in receivership. As First Union would have access to confidential information that other bidders would not, it could determine with much greater accuracy Southeast Bank's value. With that information, First Union could easily outbid the other bidders—which would have to account for value uncertainties in their bids—

> while still paying much less than it would if it purchased shares in Southeast Corp. pursuant to a friendly merger. Finally, this type of acquisition would free First Union from certain other conditions a friendly merger agreement might impose.
>
> In accord with the whole design, First Union investigated the confidential records of Southeast Bank, all the while assuring Southeast that its only intention was to investigate a friendly merger. Using this information, it then: 1) Issued "defamatory" press releases to undermine confidence in Southeast Bank (and thus, undermine both its solvency and the likelihood of its finding another friendly merger partner); 2) Urged lenders to call in outstanding Southeast Bank debt; and 3) Pressured the FDIC into rejecting other Southeast Corp. merger proposals, declaring Southeast Bank insolvent, and intervening. After the intervention, First Union made the winning bids for the Southeast Bank assets it desired, and because Southeast Bank went into receivership, the share value of Southeast Corp. dropped dramatically.

(App., *infra,* 7a-8a). The district court, however, dismissed the complaint by ruling that, while the original agreement was between Southeast and First Union (the two holding companies), and the two Southeast banks had never been parties to that agreement, the nature of the injuries caused by First Union's contractual breaches and tortious acts, which injuries included a diminution in the value of Southeast's stock in its subsidiary banks, established that the claims were derivative rather than direct. Accordingly, the district court held that the claims belonged to the FDIC, as receiver for the banks, and not to Brandt, as trustee for Southeast. (App., *infra,* 9a-13a).

On Brandt's appeal, the Eleventh Circuit affirmed the dismissal on an entirely different ground—that Southeast was completely barred from bringing its state-law cause of action against First Union as a corollary of the statutory bar

to an action against the federal government arising from the takeover of Southeast. (App., *infra,* 1a-5a).

The court of appeals acknowledged the allegations in the complaint that the injuries had been caused by First Union's pre-seizure breaches of contractual obligations and tortious conduct, but nonetheless ruled that the action was barred as a matter of law by the federal determination of insolvency. (App., *infra,* 4a). Extending precedent decided under the "discretionary function" bar of the Federal Tort Claims Act, the court ruled that Southeast was barred from bringing its state-law claims against First Union:

> [B]eing unable to sue federal regulators for their discretionary act of closing the bank, the Holding Company instead claims that the closure was precipitated by First Union's disclosures of confidential information to the federal regulators. Nevertheless, "*[o]nly* the Comptroller's final decision damaged [the Holding Company,] and no prior act or acts could have so caused the damage [alleged to have occurred by First Union] without the ultimate declaration of insolvency." *FDIC v. Irwin*, 916 F.2d 1051, 1055 (5th Cir.1990). The Comptroller's decision is not an act for which First Union can be held liable. *See id*, at 1053-56.
>
> The Holding Company is attempting to do what it otherwise could not do, sue for its damages as a result of the government's alleged improper closure of Southeast Bank. * * *. They have couched their suit in terms of the timing of the regulators' decision to close the bank, that is, that because of First Union's prompting the government officials decided to close the bank sooner than otherwise would have occurred. But underlying this claim (and throughout their complaint) is the Holding Company's belief that Southeast Bank was solvent and should not have been closed by federal regulators. Despite these efforts, the Holding Company cannot sue for the discretionary act of federal

> regulators in closing the bank. Nor can they sue First Union for "precipitating" the government's ultimate action by disclosing information the government was entitled to have.

(App., *infra,* 4a-5a).

REASON FOR GRANTING THE PETITION

In *Atherton v. Federal Deposit Insurance Corporation,* --- U.S. ---, 117 S. Ct. 666 (1997), decided on January 14, 1997, the Court reaffirmed and revitalized the precept that only in "few and restricted" instances may the federal courts create "federal common law" rules of decision and thereby displace state law. 117 S. Ct. at ---- (slip opinion at 4). "[W]hen courts decide to fashion rules of federal common law, 'the guiding principle is that a significant conflict between some federal policy or interest and the use of state law * * * must first be specifically shown.'" *Id.* at 5 (citation omitted). The Eleventh Circuit's decision in this case has cut off an action that brings *state-law claims* against a *private entity* which, without question or dispute, was *not* acting as an agent of the federal government in committing the contractual breaches and torts that gave rise to the state-law causes of action. Neither constitutional nor statutory authority, nor any significant federal policy or interest, compelled the creation of such a rule of decision; and, indeed, no such authority, policy or interest was relied upon by the court. Rather, the Eleventh Circuit created a federal common-law rule of decision, in contravention of the strict limitations on a federal court's power to promulgate "federal common law" that displaces state-law rules of decision. The disharmony among the precedents on this important issue of federalist principles commends this matter to the Court's attention on certiorari.

The Question Presented is Important

A. *The Eleventh Circuit's rules of decision.*

According to the Eleventh Circuit, the bar to an action by Southeast against the *federal government* "for its damages as a result of the government's alleged improper closure of Southeast Bank" *also* extinguishes *all* state-law claims against First Union based on breaches of contractual agreements and tortious acts that occurred months *prior to the government's takeover* of Southeast and First Union's simultaneous purchase of Southeast's assets. Because Southeast "cannot sue for the discretionary act of federal regulators in closing the bank," its cause of action against First Union also disappears. (App., *infra*, 4a-5a)

No constitutional or statutory authority for this holding is cited in the decision, and none exists. The Fifth Circuit's decision in *FDIC v. Irwin*, 916 F.2d 1051 (CA5 1990)—the *sole* authority cited by the Eleventh Circuit in support of its holding—was decided under the Federal Tort Claims Act (FTCA), which act establishes a limited waiver of federal sovereign immunity, 28 U.S.C. § 2674, while conferring immunity on *governmental officials and employees* acting within the scope of their "discretionary functions." 28 U.S.C. § 2680(a) ("[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused"). *Irwin* holds *only* that the Comptroller of the Currency is immune from liability under Section 2680(a) for a decision to close a bank that has been determined to be insolvent. 916 F.2d at 1053-54.[2] The "discretionary function" exception, "when

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[2] The first decision by a court of appeals to apply the "discretionary function" exception to a federal bank takeover was *Golden Pacific Bancorp v. Clarke*, 837 F.2d 509 (CA D.C.), *cert. denied*, 488 U.S. 890 (1988). In that case, the bank challenged the Comptroller of the Currency's declaration of insolvency and imposition of a receivership under the FTCA, seeking money damages because "the Bank

(continued ...)

properly construed * * * 'protects only *governmental actions and decisions* based on considerations of public policy.'" *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (emphasis added; citation omitted); *accord, United*

(... continued)
was in fact solvent and * * * had sufficient liquidity to meet depositors' demands." 837 F.2d at 88. The court applied the "discretionary function" exception:

> [T]he actions complained of here seem the very paradigm Congress had in mind in fashioning the exception. Congress has given the Comptroller broad authority to ensure that all national banks follow safe and sound banking practices. * * * [S]urely the decision to close the Bank—made after a week of examination and in the face of a run of withdrawals—could not possibly be thought of as other than a discretionary act that was committed by Congress to the Comptroller's judgment. * * * The Comptroller, incident to his responsibilities, must make innumerable subtle judgments in describing the content of safe and sound bank practices—judgments that draw upon a mix of law, accounting, bank custom and policy. Sometimes, as here, those determinations must be made under grave pressure and expeditiously. The government is not liable in damages merely because in a particular case the Comptroller's conclusion or some aspect of it turns out to be legally vulnerable.

Id. at 512 (citations and footnote omitted). In *Irwin*, the *Comptroller's bank closure* was challenged in an FTCA action on the theory that "the examiner reached his insolvency determinations based on personal animosity rather than the bank's financial condition." 916 F.2d at 1053. The Fifth Circuit held that "Congress intended to shield the Comptroller's insolvency determinations from tort liability," relying on the authority conferred on the Comptroller by the controlling federal statutes. *Id.* at 1054.

States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984).

In this case, *Southeast did not sue the government or any government official*; its action was brought *solely* against First Union, based on First Union's contractual breaches and tortious acts.[3] Neither *Irwin* nor any other reported decision has ever *contemplated,* much less approved, the application of the "discretionary function" exception to cloak *a private entity* with federal governmental immunity merely because the federal government closed a privately-owned corporation for insolvency.

What the Eleventh Circuit has done is to import a *statutory concept* of governmental immunity into *federal common law,* and to use that judge-created principle and extension as the dispositive rule of decision, thereby displacing *state* law—under which there is *no* legal bar to

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[3] The Eleventh Circuit's remark that Southeast "half-heartedly recognizes its inability to sue federal regulators for their decision to close the bank" (App., *infra,* 4a), is off the mark. Responding to First Union's reliance on *Irwin,* Southeast firmly and positively stated that the action in *Irwin* had challenged "the OCC's exercise of its authority to seize the bank; here, First Union's conduct—as alleged in the complaint—*was that of a predatory private entity* that was looking to destroy a weakened competitor and thereby appropriate its assets." Reply Brief of Appellant/Brief of Cross-Appellee at 22-23, *In re Southeast Banking Corporation,* 93 F.3d 750 (CA11 1996) (emphasis added). Here, no claim has been asserted against any party, governmental or private, based on the intervention or sale of the two Southeast banks, and that intervention and sale are not being challenged in any way. The claims against the private party defendant are based solely on actions that *preceded* the governmental intervention and subsequent sale. Indeed, had there been no intervention and sale, these same claims could well have been asserted by Southeast against First Union, based on the written agreement and the dealings between the two holding companies.

Southeast's direct action against First Union. *See e.g., Citibank, N.A. v. Data Lease Financial Corp.*, 828 F.2d 686, 694 n.11 (CA11 1987); *Wolfe v. American Savings and Loan Association of Florida*, 539 So. 2d 606, 607 (Fla. Dist. Ct. App. 1989).[4] This creation of federal common-law immunity for a private party that is not acting as an agent for the federal government runs directly counter to this Court's stringent rules on the exercise of the federal common lawmaking power, and goes well beyond any existing precedent.

The paradigm of a proper invocation of the federal power to create common law that displaces a state cause of action is, of course, this Court's creation of the "official immunity" doctrine for *federal officials*, under which doctrine immunity is extended for discretionary acts of federal officers. *Westfall v. Erwin*, 484 U.S. 292 (1988); *Doe v. McMillan*, 412 U.S. 306, 319 (1973); *Barr v. Matteo*, 360 U.S. 564, 570 (1959). The Court was empowered to act in this field because "the scope of absolute official immunity

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[4] As noted earlier, the case was before the Eleventh Circuit on a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the court correctly noted its obligation to accept Southeast's allegations as true. (App., *infra*, 3a). *E.g., United States v. Gaubert*, 499 U.S. at 327. Thus, it was *only by creating a bar to the action as a matter of federal common law* that the Eleventh Circuit was able to sustain the dismissal. The question whether Southeast would ultimately be able to sustain the allegations that First Union's contractual breaches and tortious acts were the cause of the injuries set forth in the complaint is, under long-standing precedent, not subject to resolution under Rule 12(b)(6) where, as here, the complaint expressly pleads causation. *See, e.g., Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F.3d 753, 756 (CA9 1994) (question whether injuries were caused by alleged civil rights violation, as claimed by plaintiff, or by federal injunction, as asserted by defendant, improperly decided on motion to dismiss; "a question of causation is preeminently a question of fact, to be decided after trial") (citation omitted).

afforded federal employees is a matter of federal law, 'to be formulated by the courts in absence of legislative action by Congress.'" *Westfall v. Erwin*, 484 U.S. at 295 (citation omitted).[5] Federal officers' immunity from state civil lawsuits uniquely and critically serves federal interests:

> The purpose of such official immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damage suits.

Id. at 295 (citations omitted).

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[5] The common-law "official immunity" doctrine has been overridden by Congress' passage of the Westfall Act, 28 U.S.C. § 2679, in 1988, in which Congress intended to "delete the 'discretionary function' requirement" and thereby "return Federal employees to the status they held prior to the *Westfall* decision." *Gutierrez de Martinez v. Lamagno*, --- U.S. ---, 115 S. Ct. 2227, 2232 (1995) (citing legislative history). Section 2679(b)(1) provides that all civil actions for money damages against federal employees are barred except for those that may be brought under the FTCA. 28 U.S.C. § 2679(b)(1). Subsection (d) of the statute provides that actions against federal employees may proceed only upon certification that the defendant employee was acting within the scope of employment at the time of the incident giving rise to the cause of action; upon such certification, the United States is to be substituted for the named defendant (and, if the action was initially brought in a state court, removal to federal court is required). 28 U.S.C. § 2679(d). Both the Congress and the Court have recognized that this substitution may well lead to imposition of a complete bar to the action where, for instance, the "discretionary function" exception of Section 2680 applies. *United States v. Smith*, 499 U.S. 160, 166-67 (1991).

The question that is presented to the Court by the Eleventh Circuit's decision in this case is whether the power to create federal common law that enabled this Court to create a doctrine of federal immunity to protect government officials can be extended to an action against a private entity that was indisputably *not* acting as an agent of the federal government. Answering this question calls onto the field the most rudimentary principles of federalism and cardinal limits on the power of the federal courts to create federal common law.

B. *Judicial restraint in the creation of federal common law.*

1. *Constraints on the federal displacement of state law.*

The Court has taken great pains to implement a strict regimen in the field of federal common law. Beginning with the adjuration that "[t]here is no federal general common law," *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 78 (1938), the Court has allowed federal common lawmaking, in the sense of judge-created law that is independent of any constitutional or statutory imperative,

> only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.

Texas Industries, Inc. v. Radcliff Materials, 451 U.S. 630, 641 (1981) (footnotes omitted). The archetypal instance in which the "rights and obligations" of the United States are involved is *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), in which the Court declared the primacy of federal common law governing the issuance of, and transactions in, the federal government's commercial paper in an action brought by the federal government to recover on an express guaranty. *Id.* at 367.

Except in such a clear-cut instance of a federal duty that arises from the Constitution or a specific Act of Congress and that is executed as part of "nationwide federal

programs," *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-28 (1979), the Court historically has trod with great care. When the "rights and obligations of the United States" have been asserted as the justification for creating federal common law and, as here, for thereby overriding substantive state law, the most stringent restrictions are called into play, as this Court reaffirmed in *Atherton v. FDIC*:

> The Court has said that "cases in which judicial creation of a special federal rule would be justified * * * are * * * 'few and restricted.'" "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts. Nor does the existence of related federal statutes automatically show that Congress intended courts to create federal common-law rules, for "'Congress acts * * * against the background of the total corpus juris of the states * * *.'" Thus, normally, when courts decide to fashion rules of federal common law, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law * * * must first be specifically shown." Indeed, such a "conflict" is normally a "precondition."

117 S. Ct. at — (slip opinion at 5); *accord, O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 512 U.S. 79, 114 S. Ct. 2048, 2055 (1994). Only in such "extraordinary cases" is "the judicial creation of a federal rule of decision warranted." *Id.* at 2056.

Westfall was such a case, but *only* because "the scope of official immunity afforded federal employees is a matter of federal law, 'to be formulated by the courts in the absence of legislative action by Congress.'" 484 U.S. at 295. So too was *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988), in which the Court created its most far-reaching rule of common-law official immunity, extending immunity to a military contractor engaged in the performance of government work. In that

decision, the Court stressed the limits of the federal common-law power:

> In most fields of activity, to be sure, this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription, or a direct conflict between federal and state law. But we have held that a few areas, involving "uniquely federal interests," are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called "federal common law."

487 U.S. at 504 (citations omitted).

The identification of "an area of uniquely federal interest * * * merely establishes a necessary, not a sufficient, condition for the displacement of state law." 487 U.S. at 507. The requisite conflict between federal policy and state law *must* be demonstrated before federal common lawmaking may proceed:

> Displacement will occur only where * * * a "significant conflict" exists between an identifiable "federal policy or interest and the [operation] of state law," or the application of state law would "frustrate specific objectives" of federal legislation. * * * Or to put the point differently, the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can. But conflict there must be * * *.

Id. at 507-08 (citations omitted).[6]

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[6] In *Boyle*, the Court held that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." *Id.* at

(continued ...)

2. *Federal common law and matters of private interest.*

The rule is straightforward: "where 'litigation is purely between private parties and does not touch the rights and duties of the United States,' federal law does not govern." *Boyle*, 487 U.S. at 506 (citation omitted). This Court's decisions have vigilantly eschewed the creation of federal common law to govern private disputes such as the one in this case.

Miree v. DeKalb County, Georgia, 433 U.S. 25 (1977), which was cited in *Boyle* as the "opposite extreme," 487 U.S. at 508, perhaps best illustrates the Court's wariness. There, plaintiffs who had been injured in an aircraft accident sued the county, seeking to impose liability on the county as third-party beneficiaries of a

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(... continued)
505-12. That decision has been applied by the courts of appeals where the federal government has delegated its discretionary governmental functions to government contractors. *E.g., Mangold v. Analytic Services, Incorporated*, 77 F.3d 1442, 1447-50 (CA4 1996) (government contractor immune from libel action based on statements made during investigation into alleged fraud; court also relied on immunity that is extended to witnesses who give testimony to public prosecutors); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1121-24 (CA3) (*Boyle* rationale "is equally applicable to military and nonmilitary contractors"; private contractor "who is compelled by a contract to perform an obligation for the United States" is extended immunity when the delegation by federal government concerns a "discretionary function"), *cert. denied*, 510 U.S. 868 (1993). While there is a split among the circuits on this question, *Carley v. Wheeled Coach*, 991 F.2d at 1119 n.1, 1123-24 (collecting cases), *no court* has extended *Boyle* to afford immunity to a private party whose alleged liability arises from conduct that is wholly separate and apart from a contractually-delegated discretionary governmental function—which is *precisely* what the Eleventh Circuit did in this case.

contract between the county and the Federal Aviation Administration (FAA). 433 U.S. at 26-27. The basis of the claim was that the county had breached its contractual duty to restrict the use of lands near the airport "by owning and maintaining a garbage dump adjacent to the airport, and that the cause of the crash was the ingestion of birds swarming from the dump into the jet engines of the aircraft." *Id.* at 27. The question before the Court was whether the interests of the United States were such as to bar the action against the county because the county's duty arose from its federal contract. *Id.* at 28-29.

The Court recognized that "[t]he operations of the United States in connection with FAA grants such as these are undoubtedly of considerable magnitude," but found

> no reason for concluding that these operations would be burdened or subjected to uncertainty by variant state-law interpretations regarding whether those with whom the United States contracts might be sued by third-party beneficiaries to the contracts * * *.

433 U.S. at 30. "Since only *the rights of private litigants*" were at issue, the Court disdained its federal common lawmaking power, ruling that "whether petitioners may sue respondent does not require decision under federal common law since the litigation is among private parties and no substantial rights or duties of the United States hinge on its outcome." *Id.* at 31-32 (emphasis added); *accord, e.g., Wallis v. Pan American Petroleum Corporation,* 384 U.S. 63, 68-69 (1966) (federal law does not govern the rights of private parties in an oil and gas lease issued under the federal Mineral Leasing Act; Court found "no significant threat to any identifiable federal policy or interest").

In *Miree,* this Court relied on *Bank of America National Trust and Savings Association v. Parnell,* 352 U.S. 29 (1956), to support its ruling that federal common law was inapposite. *Miree,* 433 U.S. at 30-31. *Parnell,* which foreshadowed this Court's most recent precedent, speaks directly to the utter impropriety of imposing

federal common-law rules of decision in the dispute between Southeast and First Union.

Parnell arose from an action for conversion of the petitioner bank's government bonds. 352 U.S. at 30-31. The specific question before the Court was whether state law, under which the burden was on the defendants to show their good faith, or federal common law, under which the burden was on the bank, applied to the trial of the lawsuit. *Id.* at 31-32. The Court reaffirmed *Clearfield Trust*, but distinguished between the federal interest that predominated in that case and the completely private nature of the dispute in *Parnell*:

> Securities issued by the Government generate immediate interests of the Government. * * * But they also radiate interests in transactions between private parties. The present litigation is purely between private parties and does not touch the rights and duties of the United States * * *.

Id. at 121.

Applying the precepts of *Parnell*, the decision in *O'Melveny & Myers* refused to impose federal common-law rules in an action brought by the FDIC as receiver against the former counsel to a failed financial institution. Treating the FDIC as a private party (because only the rights of the failed institution were at issue), 114 S. Ct. at 2053, the Court reiterated that federal common lawmaking is "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law,'" and that such conflict is "a precondition for recognition of a federal rule of decision." *Id.* at 2055 (citations omitted). Rejecting the FDIC's request for creation of a federal common-law rule on the question whether the knowledge of corporate officers would be imputed to the FDIC as receiver, the Court held:

> What is fatal to respondent's position in the present case is that it has identified no significant conflict with an identifiable federal policy or interest. There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity. The rules of

> decision at issue here *do not govern the primary conduct of the United States or any of its agents or contractors,* but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct *on the part of private actors* that has already occurred * * *.

Id. at 2055 (emphasis added).[7]

The Court's most recent exploration of its federal common lawmaking power was in the *Atherton v. FDIC* decision. There, the Court was called upon to decide whether state or federal law governed in a state-law action brought by the former Resolution Trust Corporation (RTC) and specifically, the standard of care applicable to the tortious conduct alleged in the complaint. 117 S. Ct. at --- (slip opinion at 2-3).[8] In strong language, the Court rejected the notion that federal common law must be applied "simply because the banks in question are federally chartered," exacting compliance with the controlling rule of law—first announced in 1870—that "federally chartered banks are subject to state law." *Id.* at 9. Quoting *National Bank v. Commonwealth of Kentucky,* 76 U.S. (9 Wall.) 353 (1869), the Court held that federal banks

> are subject to the laws of the State, and are governed in their daily course of business

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[7] At least one commentator read *O'Melveny & Myers* as having "appeared to employ a stricter approach to 'federal preemption' of state authority." Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation,* 144 U. PA. L. REV. 1245, 1363 (1996). The decision was seen as indicative of an inclination "to impose a 'federal common law' rule only when state power over the matter in question is clearly lacking and when adoption of a 'federal common law' rule does not require federal courts to engage in the 'weighing and appraising' of competing policy considerations more appropriately left to the legislative and executive branches." *Id.* at 1368.

[8] As in *O'Melveny & Myers,* the Court treated the FDIC (successor to the RTC) as a receiver only. *Id.* at 6.

> far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is *only* when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.

117 S. Ct. at — (slip opinion at 9). Thus, "[t]o point to a federal charter by itself shows no conflict, threat, or need for 'federal common law;'" absent "a need to create federal common law arising out of a significant conflict or threat to a federal interest," that state law governs in a tort action brought on behalf of a failed financial institution. *Id.* at 10-11.[9]

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[9] On January 21, 1997, the Court vacated and remanded another recent Eleventh Circuit common lawmaking decision for reconsideration in light of *Atherton. Hess v. FDIC,* 65 U.S.L.W. 3085 (Jan. 21, 1997). The vacated decision in *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.,* 83 F.3d 1317 (CA11 1996) (*en banc*), *vacated and remanded, sub nom. Hess v. FDIC,* 65 U.S.L.W. 3085 (Jan. 21, 1997), addressed the question whether the doctrine of *D'Oench, Duhme & Co., Inc. v. FDIC,* 315 U.S. 447 (1942), survives as a valid federal common law rule in the aftermath of Congress' enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989. 83 F.3d at 1328-30.

C. *The Eleventh Circuit's creation of federal common law to displace a state-law cause of action departs from this Court's controlling legal standard and presents a question of great importance to federal-state relations.*

In the absence of a federal statutory proscription that bars a lawsuit against a private entity whose contractual breaches and tortious acts are alleged to have caused injuries to the holding company of institutions subsequently taken over by the government, the Eleventh Circuit simply declared that an insolvency determination by federal regulators *absolutely bars* such an action. (App., *infra,* 4a-5a). This holding, it is submitted, is yet another demonstration of "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially construed) federal policy." *O'Melveny & Myers,* 114 S. Ct. at 2055. Southeast has *never* sought to impose liability for the takeover on a federal official or any agent of the federal government.[10] This cause of action is brought against a *private entity* for contractual breaches and tortious acts, all of which occurred *prior* to the regulatory closure of the banks, and all of which would have been the subject of viable state-law claims even if the two Southeast banks had never been intervened or sold.

The Eleventh Circuit appears to have gone astray in significant part because of its misconstruction of the basis for, and ramifications of, the immunity that extends to federal regulators in connection with a bank closure for insolvency. The official immunity that is conferred by statute for the exercise of discretionary governmental functions does *not* impose an imprimatur of correctness on the regulatory determination. To the precise contrary, the

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[10] This is true both directly and indirectly: the FDIC has no indemnity obligation to First Union that relates to Southeast's claims against First Union.

rationale for such immunity is simply that "the threat of liability will make federal officials unduly timid in carrying out their official duties," *Westfall v. Erwin,* 484 U.S. at 295, and that even *mistakes* must be protected from legal challenges:

> The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action *which may turn out to be founded on a mistake,* in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors * * *.

Barr v. Matteo, 360 U.S. at 571 (quoting Judge Learned Hand in *Gregoire v. Biddle,* 177 F.2d 579, 581 (CA2 1949)).

Official immunity thus "comes at a great cost" because "[a]n injured party with an *otherwise meritorious tort claim* is denied compensation simply because he had the misfortune to be injured by a federal official." *Westfall v. Erwin,* 484 U.S. at 295 (emphasis added). It does no violence to the immunity accorded to federal regulators for the closure of the two Southeast banks to allow Southeast to press a claim that might include evidence of the bank's actual solvency at the time of the closure; certainly, the Eleventh Circuit had no doctrinal basis for treating the regulators' determination as carved in granite for the purposes of a lawsuit against a private party. Instead, allowing an action to proceed against the private tortfeasor honors "the basic tenet that individuals be held accountable for their wrongful conduct." *Id.*

The particular injustice that will be worked by the Eleventh Circuit's opinion is exemplified by the precise allegations of the Trustee's complaint. Far from merely alleging, in the lower court's words, that "First Union leaked financial information concerning Southeast Bank to bank regulators resulting in the closure of the bank," (App., *infra,* 3a), the Trustee specifically claimed that First Union's tortious actions and breaches of its contractual responsibilities debilitated Southeast's efforts "to surmount its economic problems." (App., *infra,* 24a-27a). The damages from these torts and contractual breaches are alleged to have occurred, at least in part, *prior* to the government takeover; yet, under the panel's reasoning, the "hip-pocket" immunity conferred under the "discretionary function" exception *reaches back to immunize tortious conduct of a private party that occurred months before the government takeover* of the bank. The message thus broadcast to would-be predators is that their tortious conduct—when it succeeds—will thereby be immunized, with potential liability *only* if the predatory institution *fails* in an effort to foster an unwarranted takeover of its prey.[11]

For that matter, if First Union had used a different means to achieve its goal, and had injured Southeast by, for example, breaking a contract to buy shares in Southeast and its two banks or to lend money to Southeast to recapitalize those banks, the Eleventh Circuit's reasoning would *require* that First Union be immunized against liability for those

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[11] The practical implications for the banking sector of the Eleventh Circuit's ruling should also not be overlooked. If struggling bank holding companies hesitate to reach out for assistance through possible mergers or other joint arrangements because those institutions with whom they share confidential information will be protected from the consequences of wrongful conduct in the event of a government takeover of the holding company's banks, the inevitable consequence will be that such holding companies will be more reluctant to take the risk of exploring private arrangements. The government, in turn, will be forced to take over institutions that otherwise might have been saved by the private sector—all at greater taxpayer expense.

breaches as well—because the *final* injury to the two Southeast banks was "caused" by a federal government takeover. Any damage caused to a bank holding company and its banks *prior* to a federal government takeover of these banks is thus retroactively cleansed of consequences.[12] The Eleventh Circuit's surprising and unprecedented disposition of this case thus raises serious policy questions that touch directly on the government's relationship with one of the most closely-regulated businesses in the United States, and the FDIC's rights as receiver for failed banks.[13] But the repercussions will not stop in the banking sphere: the entire relationship between the federal government's prerogatives and the rights of private litigants has been called into question, in a way that opens the door to judicial creation of "official immunity" for private entities in a host of hitherto-unknown circumstances.[14] The potential

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[12] If the Eleventh Circuit's rationale in this case is carried to its logical extent, the decision would mean that *the FDIC itself, as receiver,* would be barred from pursuing claims against private tortfeasors. The FDIC, when it acts as receiver for a failed bank, has only those rights against third parties that the bank itself would have had, and there is no legal principle that holds those rights to be somehow greater than those of the bank's parent holding company.

[13] If the Eleventh Circuit's decision is left undisturbed, the very haziness of the court's reasoning will engender a wave of litigation exploring the exact parameters of the broad "Southeast" federal common-law doctrine created in this case. Both the FDIC, in its capacity as the receiver for failed institutions, and the federal courts will be assailed by parties who seek protection from legal action on the theory that their torts or contractual breaches are immune under the Eleventh Circuit's new rule.

[14] The unsuitability of the adversary process as a vehicle for the enactment of such sweeping new rules of law is one of the most compelling rationales expressed by this Court in support of judicial restraint in federal common lawmaking:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of

(continued ...)

consequences of the Eleventh Circuit's doctrinally-insupportable decision cannot be overstated.

The protection of the carefully-drawn parameters of federal common lawmaking warrants the Court's consideration of this case. The *Erie* doctrine itself "is best understood as resting on principles of judicial federalism," under which the states are entitled to presume that their law "will govern all matters subject to state authority unless and until positive federal law is adopted to preempt such law." Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation,* 144 U. PA. L. REV. 1245, 1259, 1270 (1996). "[A] healthy balance of power" between the states and the federal government is critical to the protection of federalism because "[i]n the tension between federal and state power lies the promise of liberty." *United States v. Lopez,* — U.S. —, 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring) (citation omitted).

This Court has not hesitated to grant certiorari to check the intemperate use of the federal common lawmaking power. *E.g., Parnell,* 352 U.S. at 32 (certiorari granted "[b]ecause the determination of the applicable law raised an important issue of federal-state relations"). It should do so here; the blunt tool created by the Eleventh Circuit will otherwise cut a wide swath across the judicial landscape, with federalist principles left the worse for it.

(... continued)

> investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives* * *.

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. at 647.

CONCLUSION

The petition for a writ of certiorari should be granted.

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February 1997

In Re SOUTHEAST BANKING CORPORATION, Debtor.

William A. BRANDT, Jr., Plaintiff-Appellant, Cross-Appellee,

v.

FIRST UNION CORP., First Union National Bank of Florida, Defendants-Appellees, Cross-Appellants,

Federal Deposit Insurance Corporation, Third-Party Defendant-Appellee.

No. 95-4655

United States Court of Appeals, Eleventh Circuit.

Sept. 3, 1996.

Chapter 7 trustee brought action against assignee of insolvent bank's assets from Federal Deposit Insurance Corporation (FDIC), alleging breach of merger exploration contract with debtor-bank holding company and related claims. FDIC intervened. The United States District for the Southern District of Florida, No. 94-1803-CIV-DTKH, Daniel T.K. Hurley, J., dismissed complaint, and trustee appealed. The Court of Appeals held that complaint failed to state claim.

Affirmed.

1. **Federal Courts ⇔ 794**

Federal Court of Appeals reviews district court's dismissal of complaint for failure to state claim, accepting as true plaintiffs' allegations. Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.A.

2. **Bankruptcy ⇔ 2154.1**

Banks and Banking ⇔ 67

In Chapter 7 case of debtor-bank holding company,

trustee could not bring action against former merger partner for disclosing bank's financial information to banking regulators, though trustee alleged that regulators later wrongly declared bank insolvent as result and that bank was solvent and profitable at time, merger agreement prevented partner from obtaining financial position in debtor or bank unless it bid at Federal Deposit Insurance Corporation (FDIC) auction, and merger partner eventually acquired bank's assets from FDIC; regulators did not believe that bank was solvent and profitable, regulators, rather than merger partner, caused any damage to bank, and trustee was merely substituting merger partner for regulators because he could not sue for regulators' discretionary act of closing bank.

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and REAVLEY* , Senior Circuit Judge.

PER CURIAM:

Brandt is the Chapter 7 bankruptcy trustee for the estate of Southeast Bank Corporation (the Holding Company). The Holding Company owned all of the shares of the now defunct Southeast Bank. On September 19, 1991, Southeast Bank was closed by federal and state regulators, and the F.D.I.C. was named as its receiver. First Union purchased a majority of Southeast Bank's assets at the F.D.I.C. sponsored auction. Brandt filed the instant action on behalf of the shareholders (i.e., the Holding Company) of Southeast Bank against First Union Corporation and First Union National Bank (collectively,

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* Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

First Union) for breach of contract and various statutory and common law torts. The F.D.I.C. intervened, and First Union filed a third-party complaint against the F.D.I.C. seeking contribution for any liability owed to the Holding Company. The cause found its way to district court where both the third-party complaint and the Holding Company's complaint were dismissed. Both the Holding Company and First Union appealed.

[1] We review the district court's dismissal under Rule 12(b)(6), accepting as true the plaintiffs' allegations. *South Florida Water Management Dist. v. Montalvo*, 84 F.3d 402, 406 (11th Cir. 1996). We affirm the district court's dismissal of the Holding Company's complaint. The third-party complaint is therefore moot.

In 1991, due to impending financial troubles of Southeast Bank, the Holding Company sought capital infusion through a merger with First Union. The parties entered into an agreement to explore such a possibility. The agreement permitted First Union to examine the internal financial documents of Southeast Bank on the condition that the information remain confidential. The agreement also precluded First Union from obtaining a financial position in the Holding Company or its subsidiaries, which included Southeast Bank. The only exception to this standstill provision was that First Union was able to bid at any F.D.I.C. auction.

[2] The Holding Company alleged that First Union leaked financial information concerning Southeast Bank to bank regulators resulting in the closure of the bank. The claim was that, after forcing Southeast Bank into receivership, First Union, acting on superior information, could acquire the bank. While there was a contractual relationship between First Union and the Holding company, the Holding Company's injury, if any, was the result of the

Comptroller of the Currency's decision to close Southeast Bank. In paragraph 39 of its complaint, the Holding Company alleges that when Southeast Bank was taken over in September of 1991, it was "solvent and profitable, with capital reserves substantially in excess of those required by law." This was clearly not the view of federal or state regulators who declared the bank insolvent.

Contending that Southeast Bank was liquid and should not have been closed by regulators, and being unable to sue federal regulators for their discretionary act of closing the bank, the Holding Company instead claims that the closure was precipitated by First Union's disclosures of confidential information to the federal regulators. Nevertheless, "[o]*nly* the Comptroller's final decision damaged [the Holding Company,] and no prior act or acts could have so caused the damage [alleged to have occurred by First Union] without the ultimate declaration of insolvency." *FDIC v. Irwin*, 916 F.2d 1051, 1055 (5th Cir.1990). The Comptroller's decision is not an act for which First Union can be held liable. *See id*, at 1053-56.

The Holding Company is attempting to do what it otherwise could not do, sue for its damages as a result of the government's alleged improper closure of Southeast Bank. During oral arguments and in its brief, the Holding Company half-heartedly recognizes its inability to sue federal regulators for their decision to close the bank. They have couched their suit in terms of the timing of the regulators' decision to close the bank, that is, that because of First Union's prompting the government officials decided to close the bank sooner than otherwise would have occurred. But underlying this claim (and throughout their complaint) is the Holding Company's belief that Southeast Bank was solvent and should not have been closed by federal regulators. Despite these efforts, the Holding Company cannot sue for the discretionary act of federal

regulators in closing the bank. Nor can they sue First Union for "precipitating" the government's ultimate action by disclosing information the government was entitled to have.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO 94-1803-CIV-HURLEY

WILLIAM A. BRANDT, JR.,	)
Plaintiff,	)
vs.	)
FIRST UNION CORP., et al.,	)
Defendants	)

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS, DISMISSING AND CLOSING CASE

This matter comes before the court upon defendants' First Union Corp. and the Federal Deposit Insurance Corp. ("FDIC") motions to dismiss. (Motions withdrawn from Bankruptcy Court. No docket numbers.) The court heard argument on these motions on February 15, 1995, and subsequently requested that the parties submit supplemental memoranda. The court has now reviewed those memoranda, and these matters are ripe for disposition.

I. BACKGROUND

This action was filed by the trustee for the estate of Southeast Banking Corp. ("Southeast Corp.") against First Union Corp. and First Union National Bank ("First Union Bank") (collectively, "First Union") for breach of contract and various statutory and common law torts. Southeast Corp. was a bank holding company that owned all shares in the now defunct Southeast Bank. As Trustee for Southeast Corp., plaintiff represents the interests of all its shareholders.

Upon a motion to dismiss, the court is required to take all factual allegations set forth in the complaint as true. Accordingly, the following narrative represents the facts as alleged by the Plaintiff.

In early 1991, when Southeast Bank was solvent, Southeast Corp. began looking for a strong merger partner to protect Southeast Bank from insolvency (and thus, to protect the share value of Southeast Corp. stock.) To this

end, in March of 1991, Southeast Corp. entered into an agreement with First Union Corp. whereby First Union would investigate a possible merger with Southeast Corp./Southeast Bank) collectively, "Southeast"). One term of the agreement was that Southeast would provide First Union with confidential Southeast Bank financial information and records. This information was to help First Union undertake an informed merger investigation. The agreement contained two terms germane to this action.

The first of these was a "confidentiality provision". Under this provision, First Union agreed to use the information only for the purpose of evaluating a possible friendly merger with Southeast. Otherwise, the information would be kept confidential. Furthermore, First Union agreed not to disclose the fact that Southeast was sharing this information, or that the two were discussing a possible merger.

The second relevant term was a so-called "standstill provision". Under that provision, First Union Corp. agreed not to acquire a significant interest in Southeast, or hire away any key Southeast employees, in any context other than a friendly merger. Unlike the confidentiality provision, this term contained an exception for "federally assisted regulatory transactions."

According to the complaint, First Union never intended to abide by the terms of the agreement. It wanted to acquire Southeast Bank, but not by a friendly merger. Instead, First Union hoped to drive Southeast Bank into insolvency, pressure the FDIC to intervene by disclosing the confidential information it obtained from Southeast, and then bid for Southeast Bank's assets while in receivership. As First Union would have access to confidential information that other bidders would not, it could determine with much greater accuracy Southeast Bank's value. With that information, First Union could easily outbid the other bidders -- which would have to account for value uncertainties in their bids -- while still paying much less than it would if it purchased shares in Southeast Corp. pursuant to a friendly merger. Finally, this type of acquisition would free First Union from certain other conditions a friendly merger agreement might impose.

In accord with the whole design, First Union investigated the confidential records of Southeast Bank, all the while assuring Southeast that its only intention was to investigate a friendly merger. Using this information, it then: 1) Issued "defamatory" press releases to undermine confidence in Southeast Bank (and thus, undermine both its solvency and the likelihood of its finding another friendly merger partner); 2) Urged lenders to call in outstanding Southeast Bank debt; and 3) Pressured the FDIC into rejecting other Southeast Corp. merger proposals, declaring Southeast Bank insolvent, and intervening. After the intervention, First Union made the winning bids for the Southeast Bank assets it desired, and because Southeast Bank went into receivership, the share value of Southeast Corp. dropped dramatically.

In this eleven count complaint, plaintiff seeks to recover against First Union on the following theories:

1) Breach of the confidentiality provision -- First Union volunteered confidential Southeast Bank information to the FDIC in violation of that term;

2) Breach of the standstill provision -- First Union's acquisition of Southeast Bank's assets was not pursuant to a friendly merger, and so violated that term;

3) Violation of Uniform Trade Secrets Act -- First Union willfully and maliciously misappropriated confidential Southeast information in violation of that section;

4) Trade slander -- First Union made false and defamatory public statements with the intent to undermine public confidence in Southeast Bank and make it more difficult for Southeast Bank to improve its financial situation;

5) Breach of fiduciary duty -- First Union owed a fiduciary duty to Southeast by virtue of entering into the agreement. First Union Corp. breached this duty when it: a) lobbied federal banking regulators to reject Southeast's merger and sell-off proposals, b) pressured federal banking regulators to declare Southeast Bank insolvent and intervene, and c) issued the false and defamatory statements;

6) Fraud in the inducement -- First Union fraudulently induced Southeast to enter into the merger investigation agreement while intending to breach that agreement and use the confidential information it obtained to acquire Southeast Bank on its own terms;

7) Negligent misrepresentation -- First Union induced Southeast to enter into the agreement, while negligently failing to inform Southeast that it would likely breach the agreement and use the information it obtained to acquire Southeast Bank on its own terms;

8) Promissory estoppel -- First Union "promised" to use the confidential information it obtained pursuant to the agreement only to examine the possibility of a friendly merger. Southeast then relied upon that promise to its detriment;

9) Claim for relief, constructive trust -- This is a claim for relief based upon First Union's alleged breach of fiduciary duty. Southeast seeks the establishment of a constructive trust over all of the assets of Southeast Bank unjustly acquired by First Union.;

10) Breach of implied covenant of good faith and fair dealing -- the above-described conduct breached this covenant; and

11) Tortious interference with actual and prospective business relationships -- First Union lobbied federal banking regulators to reject Southeast's friendly merger and sell-off proposals, and made defamatory public statements to undermine confidence in Southeast Bank. This was done with the intent to interfere with both existing and potential Southeast Corp. business relationships -- relationships it maintained through Southeast Bank -- and had that effect.

II. ANALYSIS

A. Direct vs. Derivative Claims

In support of their motion to dismiss, one of defendants' arguments is that plaintiff lacks standing to assert these claims. The basis of this argument is the following provision from the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"):

(A) Successor to Institution

> The [FDIC] shall, as conservator or receiver, and by operation of law, succeed to –
>
> (i) all rights, titles, powers and privileges of the insured institution and of any stockholder, member, accountholder, depositor, officer or director of such institution and the assets of the institution.

12 U.S.C. §1821(d)(2)(A)(1) (emphasis added). This provision conveys to FDIC exclusive standing to assert any derivative claims in the name of the bank for which it has intervened as receiver. In re Southeast Banking Corp., 827 F. Supp. 742, 745 (S.D. Fla. 1993). Plaintiff responds to this argument by asserting that its claims are direct, not derivative, and thus fall outside the scope of the FDIC's rights of succession. Thus, the court's inquiry must be directed to the character of the claims involved here.

Whether a claim is considered direct or derivative is a matter of state law, and is determined from the complaint rather than the label employed by the parties. Id., citing In re Sunrise Securities Litigation, 916 F.2d 874, 882 (3d Cir. 1990). Under Florida Law, a direct claim is a claim for injuries suffered directly by the shareholder that are separate and distinct from injuries to all other shareholders, i.e., an injury separate from that sustained by the bank as a corporate entity. In re Southeast Banking Corp., supra, at 745; In re Sunrise Securities Litigation, supra, at 880; Wolfe v. American Savings and Loan Assoc., 539 So.2d 606 (Fla. 3d DCA 1989); Alario v. Miller, 354 So.2d 925, 926 (Fla. 4th DCA 1978); Citizen's National Bank v. Peters, 175 So.2d 925 (Fla. 2d DCA 1965). Stated another way, "[i]f the damages are only indirectly sustained by the stockholder as a result of injury to the [bank], the stockholder does not have a cause of action as an individual." Alario v. Miller, supra, at 926.

Applying this principle to the claims involved here, it is clear that counts three through seven, nine, ten and eleven are derivative, and therefore, may only be brought by the FDIC. Furthermore, after careful analysis, it appears that two of plaintiff's "contract" claims -- counts one and eight -- are also derivative. This leaves only count

two (breach of the standstill provision), which appears to be direct. For simplicity, these two categories will be dealt with separately.

In counts three through seven, nine, ten and eleven of the complaint, plaintiff alleges that by engaging in the conduct described above, First Union breached a number of duties to Southeast, thereby injuring Southeast Corp., and derivatively, its shareholders. However, it is clear from the complaint that the only "injury" Southeast Corp. suffered as a result of these alleged breaches was the diminution of it's share value resulting from injuries suffered by Southeast Bank. In other words, this injury was suffered only as a result of injuries to Southeast Bank. There is no meaningful distinction between the harms suffered by the holding company from those suffered by the bank. Southeast Corp. was injured by First Union's alleged disclosure of trade secrets, slander, breach of fiduciary duty, fraudulent inducement, negligent misrepresentation, breach of implied covenant of good faith and fair dealing, and international interference with existing and prospective business relationships,[1] ***because and only because*** Southeast Bank was injured by these. Consequently, any claim based upon such injuries can only be asserted derivatively.

Counts one and eight present a more difficult question. Because these claims are founded upon a contract (or promise) between Southeast Corp. and First Union, there is undisputably a legal duty running directly from First Union to Southeast Corp. However, examination of the contract provision or "promise" at issue here reveals that these were intended to benefit Southeast Bank directly, and Southeast Corp. only derivatively. Therefore, any

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[1] Count eleven, the count alleging intentional interference with existing and prospective business relationships, is so limited by the language of the complaint. Plaintiff claims that the relationships injured were those Southeast Corp. maintained "through the Bank's". (Complaint, p. 40.) In other words, plaintiff does not allege any injuries to relationships Southeast Corp. maintained or might maintain wholly independent of Southeast Bank.

injury suffered by Southeast Corp. as a result of their breach resulted **only because of** an injury suffered by Southeast Bank. Furthermore, as the intended beneficiary of the confidentiality provision, Southeast Bank would certainly have been able to assert count one itself, See Hialeah Hospital, Inc. v. Raventos, 425 So.2d 1205, 1206 (Fla. 3d DCA 1983), and could have asserted count eight itself on the theory that it was the promisee.

Because Southeast Corp. suffered no injury as a result of the breach of these covenants other than those which flowed from injuries to Southeast Bank, the court concludes that these claims should be dismissed as well.

B. Breach of Standstill Provision

The claim for breach of the standstill provision appears to involve a duty and potential injuries distinct from those owed to or suffered by Southeast Bank. Specifically, by breaching this provision, First Union could acquire a controlling interest in Southeast Corp. and take some action to diminish the value of its stock without necessarily affecting Southeast Bank. Thus, count two of the complaint appears to be direct. However, it is uncontested that the standstill provision contained an exclusion for "federally assisted regulatory transactions," and that exclusion is completely applicable to the circumstances in this case. As plaintiff alleges in the complaint, First Union acquired the assets of Southeast Bank as a consequence of federal regulatory intervention. Accordingly, count two cannot stand.

III. THE COURT'S CONTINUED EXERCISE OF JURISDICTION

After dismissal of all counts of the complaint, the only issues remaining in this action relate to the parties' respective responsibilities for costs and attorney's fees. As the FDIC is a potential party to these matters, the court shall retain jurisdiction over the action under 28 U.S.C. §1819.

Accordingly, it is hereby

ORDERED and **ADJUDGED** as follows:

1) Defendants' motions to dismiss are **GRANTED**. Counts one through eleven of the complaint

are **DISMISSED** with prejudice. This shall constitute final judgment with respect to all of these claims.

2) This court retains jurisdiction to resolve any disputes regarding costs or attorney's fees.

3) The Clerk of Court is directed to enter this case **CLOSED** for administrative purposes, and declare all pending motions **MOOT**.

Done and **SIGNED** in Chambers at West Palm Beach, Florida this 24 day of April, 1995.

Daniel T. K. Hurley
United States District Judge

Copies furnished to:

EUGENE E. STEARNS, ESQ., 2200 Museum Tower, 150 W. Flagler St., Miami, Fl 33130

BEN F. JOHNSON, III, ESQ., One Atlantic Center, 1201 W. Peachtree St., Atlanta, GA 30309-3424

HILLARIE BASS, ESQ., 1221 Brickell Ave., Miami, FL 33131

GREGORY F. TAYLOR, 550 17th St., NW, Room H-5076, Washington, DC 20429

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP. 3, 1996
MIGUEL J. CORTEZ,
CLERK

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4655

D.C. Docket Nos. 94-1803-CIV,
94-629-A/91-14561

IN RE: SOUTHEAST BANKING CORPORATION,

Debtor.

WILLIAM A. BRANDT, JR.,

Plaintiff-Appellant,
Cross-Appellee,

versus

FIRST UNION CORP., FIRST UNION NATIONAL BANK OF FLORIDA,

Defendants-Appellees,
Cross-Appellants,

FEDERAL DEPOSIT INSURANCE CORPORATION,

Third-Party-defendant
Appellee.

Appeals from the United States District Court for the Southern District of Florida

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Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and REAVLEY*, Senior Circuit Judge

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pays defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 3, 1996

For the Court: Miguel J. Cortez, Clerk

By: _____

Deputy Clerk

ISSUED AS MANDATE: 11/18/96

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* Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV. 8, 1996
MIGUEL J. CORTEZ,
CLERK

IN THE UNITED STATES DISTRICT COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4655

IN RE: SOUTHEAST BANKING CORPORATION,

Debtor.

WILLIAM A. BRANDT, JR.,

Plaintiff-Appellant,

Cross-Appellee,

versus

FIRST UNION CORP., FIRST UNION NATIONAL BANK OF FLORIDA,

Defendants-Appellees,

Cross-Appellants,

FEDERAL DEPOSIT INSURANCE CORPORATION,

Third-Party-defendant

Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir, 19__, ___ F.2d ___).

Before: TJOFLAT, and BLACK, Circuit Judges, and REAVLEY, Senior Circuit Judge

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-11599

WILLIAM A. BRANDT, JR., as Chapter 7 Trustee of the Estate of Southeast Banking Corporation, Plaintiff, v. FIRST UNION CORPORATION, a North Carolina corporation, and FIRST UNION NATIONAL BANK OF FLORIDA, a national banking association with principal offices in Florida, Defendants.	**COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF AND DEMAND FOR JURY TRIAL** Florida Bar No. 334243

Plaintiff, WILLIAM A. BRANDT, JR., as Chapter 7 Trustee of the Estate of Southeast Banking Corporation ("SEBC") (the "Trustee"), sues Defendants, FIRST UNION CORPORATION ("FUnCorp") and FIRST UNION NATIONAL BANK OF FLORIDA ("FUnBank", collectively with FUnCorp, are at times referred to as "FIRST UNION"), alleging as follows:

PRELIMINARY STATEMENT

1. The Trustee brings this action to recover money damages in excess of Five Hundred Million ($500,000,000.00) Dollars and obtain equitable relief against FIRST UNION in connection with their wrongful actions leading up to and attempting to influence the seizure by federal and state regulators, including the Office of the Controller of the Currency (the "OCC") and the Federal Deposit Insurance Corporation (the "FDIC"), of SEBC's principal asset, Southeast Bank, N.A. ("SEBNA"), as well as Southeast Bank of West Florida ("SBWF"; collectively

with SEBNA, the "Banks"), and their respective subsidiaries (SEBC, SEBNA, SBWF from time to time are referred to collectively as "SOUTHEAST"). As a result of FIRST UNION's wrongful conduct, as outlined below, SEBC sustained catastrophic economic injury that led immediately and directly to its bankruptcy filing and the resulting loss of hundreds of millions of dollars to its creditors, bondholders and equity security holders and the loss of more than 4,000 jobs of Florida residents.

IDENTITY OF PARTIES/JURISDICTION

2. On September 20, 1991, SEBC filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§101, et. seq., in the United States Bankruptcy Court for the Southern District of Florida (the "Bankruptcy Court"), docketed as Case No. 91-14561-BKC-SMW. The Trustee is the duly elected and qualified successor trustee of the SEBC Chapter 7 Estate, having been elected at a reconvened meeting of creditors on April 14, 1992, and confirmed in that election by order of the Bankruptcy Court dated April 28, 1992. At all times material, SEBC was a Florida corporation with its principal place of business in Miami, Florida, that served as a bank holding company as the same is defined by 12 U.S.C. §1841.

3. SEBC was formed in or about 1967. After its formation, SEBC became the bank holding company for SEBNA, which at that time was known as First National Bank of Miami, and for SBWF. Until the revocation of its charter in September 1991, SEBNA was a national bank engaged in commercial banking with its headquarters located in Miami, Florida. At all times material until the revocation of its charter in September 1991, SBWF was a Florida-chartered bank engaged in commercial banking in the State of Florida.

4. FUnCorp is a North Carolina bank holding company that is authorized to conduct business and conducts business in the State of Florida. At all times material, FUnCorp was and is subject to the jurisdiction of this Court pursuant to Section 48.193(1)(a), Florida Statutes (1993) (conducting business in Florida), Section 48.193(1)(b), Florida Statutes (1993) (committing a tortious

act in Florida), and Section 48.193(2), Florida Statutes (1993) (engaging in substantial and not isolated activity in Florida). Additionally, FUnCorp has agreed to submit to the jurisdiction of this Court as part of the Agreement described in further detail herein and which is attached to this Complaint as Exhibit "A".

5. FUnBank is a national banking association organized under federal law that maintains its principal place of business in the State of Florida. At all times material, FUnBank was and is subject to the jurisdiction of this Court pursuant to Section 48.193(1)(a), Florida Statutes (1993) (conducting business in Florida), Section 48.193(1)(b), Florida Statutes (1993) (committing a tortious act in Florida), and Section 48.193(2), Florida Statutes (1993) (engaging in substantial and not isolated activity in Florida). With the exception of a relative handful of directors' qualifying shares, FUnBank is wholly-owned, directly or indirectly, by FUnCorp. The acquisition of SEBNA's and SBWF's assets from the FDIC as receiver for both entities was effected by FIRST UNION through FUnBank.

ANALYSIS OF CLAIMS

6. Following his appointment, the Trustee undertook an investigation into the takeover of SEBNA. That investigation has been repeatedly frustrated by FIRST UNION and the FDIC, which seized virtually all of the business records of SEBC and SEBNA in September 1991, and have refused wrongfully to return these records to the Trustee. In fact, the Trustee has been forced to compel the production of certain of these documents in the possession of FIRST UNION and the FDIC in numerous actions in federal courts along the eastern seaboard of the United States.

7. The consistent, unrelenting opposition and lack of cooperation by FIRST UNION and the FDIC have prevented the Trustee from developing evidence of the full scope of FIRST UNION's wrongful conduct, which is described in this Complaint only in as much detail and specificity as is possible under circumstances where limited documents have been produced, many in incomplete or redacted form by virtue of broadly and often spuriously

asserted claims of privilege. Accordingly, the Trustee has been forced to allege certain allegations contained herein on the basis of information and belief; this has been necessitated due to FIRST UNION and the FDIC's exclusive possession and control of many of the materials that underlie those allegations. Thus, the allegations contained herein in no way constitute a full and complete description of the acts that form the basis of liability in this action and it is anticipated that these facts will be supplemented by additional evidence that will be produced during the discovery process.

FACTUAL BACKGROUND

8. In early 1991, due in large measure to a downturn in the South Florida economy, SEBNA had a significant portfolio of nonperforming loans. Furthermore, certain losses suffered by SEBNA in 1990, which had received widespread publicity, had caused the withdrawal by many nervous depositors of some or all of their monies on deposit at SEBNA. Nevertheless, SEBNA remained solvent, with a reported capital and loan loss reserve of well over $1 billion as of March 30, 1991. In fact, as of the date SEBNA and SBWF were seized by the FDIC and their assets simultaneously conveyed to FIRST UNION, SEBC was one of the premier bank holding companies in Florida, controlling more than $10 billion in assets through SEBNA, SBWF and other subsidiaries and affiliates.

9. Notwithstanding the extent of SEBNA's capital and reserves, by March 1991 the SEBC Board of Directors had determined that a business merger or other consolidation transaction with a strong national or regional financial institution could be in SEBC's best interests. Feelers seeking out appropriate merger partners were then sent out to a variety of large financial institutions, including Barnett Bank, NationsBank (f/k/a NCNB), Citibank, Bank of America and FIRST UNION.

10. On March 18, 1991, as a preliminary step to providing FIRST UNION with the confidential information regarding SOUTHEAST that FIRST UNION requested to enable it to analyze such a transaction, SEBC sent a draft of a proposed Confidentiality Agreement to Edward Crutchfield, Chairman of the Board of FUnCorp. After

certain changes were made to the Confidentiality Agreement at the request of counsel for FUnCorp, SEBC and FUnCorp entered into the Confidentiality Agreement (the "Agreement") on March 25, 1991. The Agreement provided that, upon certain limited terms and conditions, SEBC would provide certain confidential financial information, records and data to FIRST UNION for the limited purposes and uses described in the Agreement. A true and correct copy of the Agreement as executed on behalf of FIRST UNION by its Executive Vice President and Chief Financial Officer, Robert T. Atwood, is attached and made a part hereof as Exhibit "A".

11. The Agreement contained two separate principle covenants to be observed by FUnCorp. First, pages 1 and 2 of the Agreement imposed on FUnCorp the obligation (the "Confidentiality Covenant") to keep confidential all information furnished to it by SEBC and to use that information only in the analysis of a voluntary consolidation transaction with SOUTHEAST. Specifically, the Confidentiality Covenant provided that:

> the Evaluation Material will be used solely for the purpose of evaluating a possible transaction between you [FUnCorp] and the Company [SEBC], and that all information included in the Evaluation Material will be kept confidential by you [FUnCorp] and your directors, officers, employees, agents and advisors.

Exhibit "A", pp. 1-2.

12. Further, FUnCorp agreed in the Confidentiality Covenant not to:

> disclose to any person either the fact that information has been provided under [the Agreement] or that discussions or negotiations are taken or have taken place concerning the possible transactions between you [FUnCorp] and the company [SEBC], or any of the terms, conditions or other facts with respect to any such discussions or possible transaction.

Exhibit "A", p. 2.

13. The second principle obligation undertaken by FUnCorp (the "Standstill Provision") was contained on pages 3 and 4 of the Agreement. The Standstill Provision prohibited FUnCorp from taking certain actions - including acquiring a significant interest in SEBC or hiring away key employees of SEBC or SEBNA - in any context other than a consensual transaction between FUnCorp and SEBC under the Agreement. The Standstill Provision listed a series of exceptions under which the actions it otherwise prohibited could occur without FUnCorp's violating the Agreement. The last such exception, contained in clause "(iv)" on page 4 of the Agreement, provided that the obligations of the Standstill Provision would not apply to "federally assisted regulatory transactions." This exception was added to the Agreement at the written request of counsel to FUnCorp dated March 22, 1991 and amended only the Standstill Provision, not the Confidentiality Covenant of the Agreement.

14. At the time FIRST UNION entered into the Agreement, it was already considering a transaction far different from the type of consensual transaction that was contemplated under the Agreement and formed the basis upon which SEBC had agreed to provide to FIRST UNION extensive proprietary and confidential information regarding SOUTHEAST. Specifically, FIRST UNION's advisors were already analyzing whether the business transaction most beneficial to FIRST UNION would be to acquire SOUTHEAST's assets through the intervention of federal regulators.

15. Using the confidential information SOUTHEAST trustingly placed at FIRST UNION's disposal, FIRST UNION's strategy, undisclosed to and fraudulently concealed from SEBC, was actively to prod federal regulators to "resolve" as expeditiously as possible the situation at SOUTHEAST. This arrangement of achieving the closure of the Banks by the regulators and simultaneously acquiring many of those Banks' assets and liabilities from the regulators had the great added benefit to FIRST UNION that it would be far cheaper than the type of consensual transaction with SOUTHEAST contemplated by the Agreement.

16. Neither at the time it entered into the Agreement, nor for some four months thereafter, did FIRST UNION disclose to SEBC, from which it continued to obtain confidential information under the Agreement, that FIRST UNION was frequently and clandestinely communicating with federal banking regulators, including the FDIC, to discuss the expeditious "resolution" of SEBC/SEBNA. Similarly, FIRST UNION also failed to disclose to SOUTHEAST its intent and active efforts to obtain a federal intervention of the Banks. Those communications, including a series of meetings primarily with the FDIC, as well as the OCC and the Board of Governors of the Federal Reserve ("FRB"), occurred on a recurring basis through the months of April, May, June and July, 1991, all undisclosed to SOUTHEAST by FIRST UNION or any of those regulators. Additionally, those meetings and exchanges between FIRST UNION and the regulators took place at a time:

(1) when SOUTHEAST continued to have $1 billion or more in capital and loan loss reserves;

(2) long before any step had been taken by federal or state regulators to place SEBNA or SBWF in receivership or to seek bidders for the assets of those Banks;

(3) while those regulators were simultaneously discussing with SOUTHEAST other possible merger partners or investors; and

(4) while SOUTHEAST innocently continued to provide FIRST UNION with confidential information under the Agreement.

17. In complete and blatant disregard of its obligations under the Confidentiality Covenant of the Agreement, and in violation of the Standstill Provision of the Agreement as well, FIRST UNION in numerous instances used or alluded to that confidential information in their attempts to exert influence on federal regulators in order to bring about a rapid, federally-assisted takeover of

SEBNA in FIRST UNION's selfish interest, regardless of the consequences to SEBC, its shareholders and creditors, SEBNA and SBWF depositors, or the thousands of SOUTHEAST employees involved.

18. At any point during that lengthy period of time, FIRST UNION could and, under any reading of the Agreement or the nature of their relationship with SOUTHEAST, should have sought SEBC's permission to engage in such discussions with the FDIC or other federal regulators -- or even simply have informed SEBC, as a matter of courtesy, of those meetings and exchanges. However, FIRST UNION instead failed to inform or seek the consent of SEBC to the unbridled use of the confidential information for FIRST UNION's own purposes and against SEBC's interests -- despite the specific prohibition on such use contained in the Agreement.

19. Relying on both the terms of the Agreement and a misguided belief in the good faith and integrity of FIRST UNION and its senior management, SEBC wrongfully assumed that FIRST UNION was dealing honestly with it and made SOUTHEAST's confidential financial books and records and senior officers available to FIRST UNION and their representatives on an ongoing and continuous basis from the time the Agreement was executed. The information flowed to FIRST UNION over more than five months, and included on-site "due diligence" at various SOUTHEAST locations for a period of many weeks, conducted by hundreds of FIRST UNION representatives. The information provided to FIRST UNION by SEBC under the Agreement far exceeded the information that would otherwise have been available to FIRST UNION under any circumstances, including any due diligence that would have been available to them as part of a bid under FDIC auspices, other than where SEBC was voluntarily turning over such information. The information was turned over by SEBC in misplaced reliance on FIRST UNION's good faith commitment and representations to abide by both its written confidentiality obligations in the Agreement and general business and banking ethics.

20. FIRST UNION's insistence on the rapid "resolution" of the SEBNA/SBWF matter by federal

regulators was prompted by the knowledge that if SOUTHEAST continued to operate, SEBC might find other merger partners or investors, or a turnaround in the economy might result in a substantial improvement in its condition. This was particularly feasible in light of the more than $1 billion in capital and reserves that SOUTHEAST still enjoyed. In recognition of these possibilities, and in an attempt to hasten a government-sponsored takeover from which it intended to, and has in fact, derived enormous pecuniary benefit, FIRST UNION repeatedly stressed to the regulators that any delay in intervening SEBNA and SBWF would reduce the amount of money that would be bid by FIRST UNION in any eventual sale held as part of an intervention in the Banks.

21. As the foregoing paragraphs indicate, throughout the Spring and early Summer of 1991, unbeknownst to SEBC, the FDIC and other federal regulators were repeatedly meeting and communicating with FIRST UNION to discuss and decide the fate of SOUTHEAST. As reflected in a FIRST UNION internal memorandum, attached hereto as Exhibit "B", these clandestine meetings involved the Chairman of the FDIC and at least one member of the Board of Directors of the FDIC, who was a former Vice Chairman and long-time employee of FIRST UNION.

22. All of these meetings and other clandestine activities took place at a time when the Banks were solvent, SOUTHEAST had capital and reserves of more than a billion dollars on a consolidated basis, and the processes contemplated by federal and state law for the intervention of troubled financial institutions had not been commenced. All of these clandestine meetings and communications, aside from being profoundly unethical insofar as they allowed a direct business competitor of SOUTHEAST to pressure government regulators to put its competition out of business, took place without any express statutory basis or justification.

23. As FIRST UNION knew or should have known, no provision of federal law in effect in 1991 expressly authorized the FDIC or other federal regulators to meet and communicate with a competitor and prospective

acquirer of a bank which was then solvent, and for which the statutory process of intervention had not begun, to exchange confidential information regarding that institution and plan its fate, all without the bank's knowledge and consent. Therefore, the confidential meetings and communications between the FDIC, other federal regulators and FIRST UNION in April, May, June and early July of 1991 occurred completely outside of the express statutory framework for intervention and sale of a troubled financial institution.

24. As part of its strategy to bring about the early "resolution" of the Banks by federal and state regulators, with itself as the self-anointed "savior" and primary beneficiary of those entities' collapse, FIRST UNION also disseminated public statements which had the added benefit of further undermining public confidence in SOUTHEAST, thus making it more difficult for SOUTHEAST to surmount its economic problems without the type of "resolution" sought by FIRST UNION. FIRST UNION made these statements well aware of the likely effect they would have on SOUTHEAST, knowing that once the public's faith in any financial institution is sufficiently shaken, the withdrawal of deposits and business from that institution will eventually bring about its downfall.

25. As one example, on April 11, 1991, only 16 days after signing the Agreement and on the same day it was holding one of its early secret "resolution" meetings with the FDIC, FIRST UNION issued a press release denying that it had any interest in negotiating with SEBC regarding a possible merger or consolidation. At the same time, FIRST UNION was privately telling SEBC to ignore its public statements, which were allegedly being made to avoid adverse swings in the value of FUnCorp's stock on financial markets, and did not reflect the real intentions of FIRST UNION. Similarly, on June 17, 1991, approximately three days after some 250 of its employees descended on SOUTHEAST to conduct weeks of due diligence with SOUTHEAST's consent and assistance, all ostensibly as part of a possible consensual combination under the Agreement, FIRST UNION publicly announced that it had no interest in acquiring or combining with

SOUTHEAST unless federal assistance was available. FIRST UNION further mischaracterized its true intentions by publicly stating that while its employees had conducted some due diligence at SOUTHEAST, this had occurred in connection with some possible limited branch and asset purchases in North Florida. This latter statement, again, was a complete and blatant lie, publicly disseminated based on information known by FIRST UNION to be false and for the purpose of further undermining eroding public confidence in SOUTHEAST, thus putting additional pressure on federal and state regulators to "resolve" quickly the SOUTHEAST situation and strong-arming SOUTHEAST to be more receptive to whatever terms FIRST UNION might eventually offer.

26. Over the same period of months that FIRST UNION was meeting secretly with the FDIC and other federal banking regulators to bring about the speedy "resolution" of the Banks on terms sought by and beneficial to FIRST UNION, SEBC was seeking significant investment from a variety of other sources and was attempting to sell some of the Bank's branches and other assets.

27. At least in part as a result of FIRST UNION's persistent and persuasive efforts, and for unexplained reasons which puzzled SEBC's senior management at the time, in the late Spring and early Summer of 1991 the FDIC and other federal banking regulators became increasingly intransigent and resistant to efforts by SEBC to dispose of certain of its assets at a profit, or to find other solutions to SEBNA's problems. Thus, a portion of the Bank's branches that were to be sold to AmSouth and the possible securitization and sale of SOUTHEAST's credit card portfolio were either not approved by federal regulators or were received with little enthusiasm, killing the proposed deals.

28. Until approximately July 9, 1991, FIRST UNION declined to disclose to SEBC the nature of the combination arrangement they were planning to propose under the Agreement. At a meeting held in Miami on July 12, 1991, however, FIRST UNION finally disclosed its scheme for the "resolution" of the Banks to SEBC's board

of directors. Consistent with FIRST UNION's secret discussions with the FDIC and other federal regulators over the preceding months, the arrangement proposed by FIRST UNION would have required federal intervention and the closing of SEBNA, leaving the shareholders and bondholders of SEBC with a small and extremely contingent interest based primarily on the recoveries obtained from the Bank's troubled assets. FIRST UNION's proposed scheme, which effectively called upon SOUTHEAST to "invite" the regulators to seize the Banks and sell their assets to FIRST UNION in an assisted transaction offering only a remotely contingent return to SEBC bondholders and shareholders, was determined by SEBC's Board of Directors and its management to be unacceptable and unwarranted given the actual condition of SOUTHEAST.

29. It was at or about this time that FIRST UNION also first disclosed to SOUTHEAST that in gross disregard and breach of the Agreement and ethical business principles, and behind SOUTHEAST's back, FIRST UNION had been secretly discussing and planning SOUTHEAST's fate with the FDIC and other federal regulators since at least early April of 1991.

30. SOUTHEAST's negative reaction to the FIRST UNION proposal did not inhibit FIRST UNION's efforts to acquire the assets and branches of the Banks; to the contrary, FIRST UNION promptly proceeded to communicate even more forcefully with the FDIC, strongly urging in writing the speedy "resolution" of the Banks, proposing a format desired by FIRST UNION for that "resolution" and touting various reasons why FIRST UNION was particularly well-suited to carry out the execution. Among other information communicated to the FDIC by FIRST UNION were extensive and persuasive financial charts created to reflect the reasons why the proposed acquisition should require the seizure and closing of the Banks. Much if not virtually all of the information used to prepare those charts and projections was obtained by FIRST UNION from SOUTHEAST under the Agreement, and was now being used in contravention of that Agreement to destroy SOUTHEAST as an independent competitor to FIRST UNION. Perhaps even more

outrageous is that at the same time these communications were ongoing with the FDIC, FIRST UNION continued to assert in conversations and negotiations with SEBC that its effort to consummate an acceptable consensual arrangement under the Agreement had not been abandoned.

31. SEBNA began in or about mid-July of 1991 to borrow at the Federal Reserve Bank's ("FRB") discount window in order to maintain adequate liquidity. These borrowings continued until SEBNA was intervened on September 19, 1991. While on the date of its intervention the actual amount on loan to SEBNA from the FRB was approximately $550 million, the less than $40 million annual carrying or interest cost of that fully collateralized financing was of little significance when compared to the almost $1 billion in capital and reserves which SOUTHEAST maintained through the period of borrowing. Accordingly, had the progressive erosion of faith in SOUTHEAST's survival been halted, this financing would have been of little economic significance to SOUTHEAST and would not have had a material impact on its economic viability.

32. In light of FIRST UNION's numerous communications with federal banking regulators for the previous five months, it was not surprising that FIRST UNION's wish was granted when in approximately the third week of August 1991, the FDIC began seeking bids for a federally-assisted sale of the assets of the Banks. In connection with this sale, FIRST UNION was again granted the opportunity to conduct due diligence at SOUTHEAST, albeit on a far more limited scale than the extensive review previously conducted under the Agreement with SEBC's blessing.

33. On or about September 12, 1991, FIRST UNION submitted to the FDIC its completed application or "bid" to acquire the Banks. As that application clearly reflects, in complete disregard of the terms of the Agreement, FIRST UNION extensively used and relied on the information which had been voluntarily provided to it by SEBC on a confidential basis to formulate what turned out to be the winning bid to the FDIC.

34. On September 19, 1991, the FRB declared its approximately $550 million in discount window loans to SEBNA immediately due and payable by the close of business on that day, knowing that the Bank was unable to repay that significant amount of cash on the spot. The OCC then immediately declared it insolvent. Virtually simultaneously, the Florida Department of Banking and Finance ("DBF") declared SBWF insolvent. The OCC and the DBF then promptly named the FDIC receiver for each of the Banks, and immediately thereafter the FDIC proceeded with its prearranged sale of the vast majority of the Bank's assets to FIRST UNION in accordance with the terms of its winning bid.

35. As a result of the extensive confidential information which it had been provided by SEBC under the Agreement exclusively for the purpose of consideration of a consensual business consolidation, FIRST UNION was easily able to outbid its nearest competitors. This, in large part, was due to the fact that FIRST UNION, by its own written admission to the FDIC, had hundreds of people spend in excess of 40,000 hours performing due diligence on the Banks. This wealth of information voluntarily provided by SOUTHEAST on a confidential basis allowed FIRST UNION a remarkably high degree of confidence as to the value of SOUTHEAST's assets. Thus, reports indicate that FIRST UNION paid the FDIC approximately $81 million to acquire SEBNA and SBWF, while also agreeing to absorb 15% of the losses on SEBNA's troubled assets, the other 85% being absorbed by the FDIC as a subsidy to induce FIRST UNION to proceed. Moreover, as part of the bid acceptance, the FDIC agreed to purchase $150 million in preferred stock issued by FIRST UNION to enable it to go forward with the transaction.

36. Even more remarkable, the very next day after FIRST UNION acquired the assets of the Banks, having outbid its competitors dramatically, the Chairman of FUnCorp, Edward Crutchfield, was able to state confidently at a press conference that FIRST UNION would derive profits from the acquisition of at least $50 million in 1992, $100 million in 1993, and between $115 and $150 million each year for 1994 through 1996. Upon information and belief, the actual profits to date have far

exceeded even these aggressive estimates. Mr. Crutchfield was able to make these extraordinary public projections thanks to the extensive confidential information SOUTHEAST made available to FIRST UNION under the Agreement, and which FIRST UNION conveniently used in breach of the Agreement to win the FDIC bid.

37. Virtually until the moment when the Banks were intervened, SOUTHEAST continued to negotiate with other possible investors whose investment could well have allowed the survival of SOUTHEAST. These efforts were repeatedly undermined as the regulators, influenced in part by FIRST UNION, became increasingly unreceptive to any consensual arrangement sought by SOUTHEAST.

38. At the time the Banks were intervened, SOUTHEAST had capital and reserves on a consolidated basis of approximately $900 million. Despite this fact, the FDIC publicly projected as of the date of the intervention that its insurance fund would lose at least $350 million as a result of the intervention of the Banks. As the FDIC now publicly admits, the combined receiverships of SEBNA and SBWF will instead produce a significant surplus, even after payment of $152 million in subordinated debt to SEBC, and will require no unreimbursed expenditure from the FDIC fund.

39. Similarly, by all accounts, at the time it was taken over in September 1991, SBWF was solvent and profitable, with capital and reserves substantially in excess of those required by law.

40. Thus, even with the mammoth disruption to the Banks' assets and business over these past 2 1/2 years as a result of the intervention by the FDIC, their sale to FIRST UNION, and the wholesale firing by FIRST UNION and the FDIC of thousands of SOUTHEAST employees familiar with those assets and business, the capital and reserves of the Banks on September 19, 1991 remained more than adequate to meet those institutions' liabilities.

41. These undisputed facts heighten the tragedy of what happened to SEBC and its subsidiaries: the economic loss, suffering and injury felt by this community and the State of Florida, the thousands of employees who lost their jobs, all of those borrowers whose loans from the

Banks ceased to be funded or were accelerated after the intervention, and the disappearance from South Florida of a leading corporate citizen and benefactor, to mention only some of the victims and consequences of this debacle -- all of which were completely unnecessary.

COUNT I

Breach of Contract

(Breach of the Confidentiality Covenant)

The Trustee incorporates the allegations contained in paragraphs 1 through 41 as though fully set forth herein.

42. This is an action for breach of contract for which the Trustee is entitled to recover damages against FIRST UNION that exceed Five Hundred Million ($500,000,000) Dollars, exclusive of interest and costs.

43. As more fully alleged in paragraphs 1 through 41, SEBC and FIRST UNION entered into the Agreement on March 25, 1991. (Exhibit "A" hereto). Pursuant to the Confidentiality Covenant in the Agreement, FIRST UNION unconditionally agreed to keep certain financial information furnished by SEBC confidential, and further agreed to utilize that information solely for the purpose of evaluating a possible consensual business transaction between FIRST UNION and SEBC.

44. As more fully alleged in paragraphs 1 through 41, FIRST UNION breached the Confidentiality Covenant by, inter alia: wrongfully disclosing the confidential information to third parties without SEBC's knowledge or consent; improperly using and sharing the information to exert pressure and influence over the FDIC, the OCC, the FRB and possibly others in an effort to effectuate a premature and improper government-assisted takeover of SEBNA; improperly using the information in preparing its own bid package to acquire the assets of the Banks from the FDIC; and improperly interfering in various transactions SEBC sought to bring about with the consent of federal regulators.

45. As a direct result of FIRST UNION's breach of contract, SEBC suffered damages in excess of Five Hundred Million ($500,000,000) Dollars.

46. All conditions precedent to the filing and maintenance of this action by the Trustee have been waived, excused or performed.

WHEREFORE, the Trustee requests that this Court enter a judgment for damages against FIRST UNION in excess of Five Hundred Million ($500,000,000) Dollars, including but not limited to all of the profits FIRST UNION has derived as a result of committing the breaches alleged herein, plus all applicable interest and costs incurred by the Trustee in the prosecution of this action, and grant any such other and further relief as this Court deems just and proper.

COUNT II

Breach of Contract

(Breach of the Standstill Provision)

The Trustee incorporates the allegations contained in paragraphs 1 through 41 as though fully set forth herein.

47. This is an action for breach of contract for which the Trustee is entitled to recover damages against FIRST UNION that exceed Five Hundred Million ($500,000,000) Dollars, exclusive of interest of costs.

48. As more fully alleged in paragraphs 1 through 41, SEBC and FIRST UNION entered into the Agreement on March 25, 1991. Pursuant to the Confidentiality Covenant in the Agreement, FIRST UNION unconditionally agreed to keep certain financial information furnished by SEBC confidential, and further agreed to use the information only in its analysis of a consensual transaction under the Agreement.

49. As alleged in paragraph 12 of this Complaint, the Agreement also contained a Standstill Provision pursuant to which FIRST UNION was precluded from acquiring SEBC in anything other than a consensual transaction with SEBC. The Agreement specifically provided:

> You [FIRST UNION] acknowledge that the Evaluation Material is being furnished to you in consideration of your agreement that, for a period of eighteen (18) months from the date of this letter, neither you nor your affiliates . . . will (and neither you nor they will assist,

advise or encourage others to), directly or indirectly . . .

> (i) acquire, or agree, offer, seek or propose to acquire, ownership (or request permission to do any of the foregoing) of any of the Company's [SEBC] securities, assets or businesses, or any rights, warrants or options to acquire such ownership . . .
>
> (iv) enter into any discussions, negotiations, arrangements or understandings with any third party with respect to any of the foregoing, except as such may be in furtherance of discussions or negotiations between you and the Company [SEBC] . . .

50. The Standstill Provision contained various exceptions. Exception "(iv)" provided that the actions from which FUnCorp was prohibited from taking would not apply to "federally assisted regulatory transactions." While this exception allowed FUnCorp to bid at a FDIC sale of SEBC, it did not authorize FUnCorp to wrongfully disclose the confidential information provided by SEBC to third parties without SEBC's knowledge or consent; to improperly use the information actively to exert pressure and influence over the FDIC, the OCC, the FRB and other third parties in an effort to effectuate a premature and improper government - assisted takeover of SEBNA; to improperly use the information in preparing its own bid package to acquire SEBC from the FDIC; or to improperly interfere in various transactions SEBC sought to bring about with the consent of federal regulators.

51. By virtue of its engaging in these various prohibited activities, FUnCorp, with the active assistance and participation of FUnBank, breached the Standstill Provision of the Agreement. As a direct result of FIRST

UNION's breach of contract, SEBC suffered in excess of Five Hundred Million ($500,000,000) Dollars.

52. All conditions precedent to the filing and maintenance of this action by the Trustee have been waived, excused or performed.

WHEREFORE, the Trustee requests that this Court enter a judgment for damages against FIRST UNION in excess of Five Hundred Million ($500,000,000) Dollars, including but not limited to all of the profits FIRST UNION has derived as a result of committing the breaches alleged herein, plus all applicable interest and costs incurred by the Trustee in the prosecution of this action, and grant any such other and further relief as this Court deems just and proper.

COUNT III

(Breach Of Uniform Trade Secrets Act)

The Trustee incorporates the allegations contained in paragraphs 1 through 41 as though fully set forth herein.

53. This is an action against FIRST UNION for its violation of the Uniform Trade Secrets Act, §688.001, et. seq., Florida Statutes, and for resulting damages that exceed Five Hundred Million ($500,000,000) Dollars, exclusive of applicable interest, costs and attorneys' fees.

54. As more fully alleged in paragraphs 1 through 41, SEBC and FIRST UNION entered into the Agreement on March 25, 1991. Pursuant to the Agreement, FIRST UNION unconditionally agreed to keep certain financial information furnished by SEBC confidential, and further agreed to use the information for limited purposes, specifically in its analysis of a business merger transaction being contemplated by FIRST UNION and SEBC.

55. The foregoing conduct on the part of FIRST UNION constitutes a violation of the Uniform Trade Secrets Act. Additionally, FIRST UNION's misappropriation of confidential information was done wilfully and maliciously, thereby entitling SEBC to recover exemplary damages. Moreover, the award of damages must be based on both the actual loss incurred by SEBC and the amount of profits FIRST UNION has received from its acquisition of the Banks, that being the amount by which

FIRST UNION has been unjustly enriched by its improper use of trade secrets.

56. The Trustee has retained the undersigned counsel to prosecute this action, and has agreed to pay such counsel a reasonable fee for legal services provided. Pursuant to Fla. Stat. §688.005 (1993), the Trustee is entitled to recover attorneys' fees incurred in this matter.

WHEREFORE, the Trustee requests that this Court enter a judgment for damages against FIRST UNION in excess of Five Hundred Million ($500,000,000) Dollars, including but not limited to all of the profits FIRST UNION has derived as a result of committing the statutory violations described herein, plus exemplary damages as provided by Statute, plus all applicable interest, attorneys' fees and costs incurred by the Trustee in the prosecution of this action, and grant any such other and further relief as this Court deems just and proper.

COUNT IV

(Trade Slander)

57. The Trustee incorporates the allegations contained in paragraphs 1 through 41 as though fully set forth herein.

58. This is an action for trade slander for which the Trustee is entitled to recover damages against FIRST UNION that exceed Five Hundred Million ($500,000,000) Dollars, exclusive of applicable interest and costs.

59. As more fully alleged in paragraphs 1 through 41, SEBC and FIRST UNION entered into the Agreement on March 25, 1991. Pursuant to that Agreement, FIRST UNION unconditionally agreed to keep certain financial information furnished by SEBC confidential, and further agreed to use that information solely in its consideration of a consolidation transaction with SOUTHEAST.

60. Immediately after entering into the Agreement, FIRST UNION intentionally and systematically made false statements to the public with the specific intent of undermining public confidence in SOUTHEAST, thus making it much more difficult for SOUTHEAST to surmount the economic problems it was experiencing.

FIRST UNION made these statements knowing that their effect would be to further undermine SOUTHEAST as a financial institution, leading to the withdrawal of deposits and business from that institution and helping to cause its downfall.

61. FIRST UNION furthered its improper objectives by engaging in multiple acts whereby the financial status and commercial viability of SOUTHEAST was placed into question. Specifically, immediately after it entered into the Agreement with SEBC, FIRST UNION wilfully and maliciously misrepresented to the public the following: (a) that FIRST UNION had no interest in negotiating with SEBC regarding a possible merger or consolidation; (b) that FIRST UNION had no interest in acquiring or combining with SOUTHEAST unless federal assistance was involved; and (c) that, while FIRST UNION employees had conducted some due diligence at SOUTHEAST, this had occurred solely in connection with some possible limited branch and asset purchases in North Florida.

62. FIRST UNION made the foregoing misrepresentations for no reason other than to undermine and erode public confidence in SOUTHEAST, and to pressure federal and state regulators to "resolve" SOUTHEAST as quickly as possible. Further, as a result of these statements, public confidence in SOUTHEAST was eroded, increasing the number of depositors and businesses withdrawing their funds from the Bank.

63. The foregoing statements of FIRST UNION were false and known to be false at the time they were made, and were made solely for the purpose of defaming SOUTHEAST. Additionally, these false statements were communicated with wanton, wilful, reckless and intentional disregard for the rights of SOUTHEAST and, therefore, constitutes slander per se.

64. As a direct result of these slanderous statements, SOUTHEAST suffered damages in excess of Five Hundred Million ($500,000,000) Dollars. These damages are separate and distinct in nature and amount from those damages alleged to have been involved as a result of FIRST UNION's breach of the Agreement.

WHEREFORE, the Trustee requests that this Court enter a judgment for damages in the amount of Five Hundred Million ($500,000,000) Dollars against FIRST UNION, including but not limited to all of the profits FIRST UNION has derived as a result of committing the acts described herein, plus all applicable interest and costs incurred by the Trustee in the prosecution of this action, and grant any such other and further relief as this Court deems just and proper, such as punitive damages.

COUNT V

(Breach of Fiduciary Duty)

The Trustee incorporates the allegations contained in paragraphs 1 through 41 as though fully set forth herein.

65. This is an action for breach of fiduciary duty against FUnCorp for which the Trustee is entitled to damages that exceed Five Hundred Million ($500,000,000) Dollars, exclusive of interest and costs.

66. By virtue of entering into the Agreement, SEBC and FUnCorp entered into a fiduciary relationship. In connection with that relationship, SEBC reposed trust and confidence in FUnCorp that it would abide by its commitment of confidentiality. FUnCorp knowingly and voluntarily accepted this responsibility and, as a result, was bound to act in good faith and with due regard to SEBC's best interests.

67. After execution of the Agreement, SEBC made available its confidential books and records, and those of SEBNA and SBWF, to FIRST UNION, thereby evidencing its trust in FIRST UNION to keep its promise of confidentiality.

68. As more fully alleged in paragraphs 1 through 41, FIRST UNION breached its fiduciary duty to SEBC when, independent of, and separate from, its breach of the Agreement, FIRST UNION (1) met with federal banking regulators for the purpose of aggressively pressuring and influencing them to prematurely seize SEBNA; (2) issued false public pronouncements regarding the status, nature and purpose of its negotiations with SEBNA; and, (3) lobbied federal banking regulators to reject transactions proposed by SEBNA whereby SEBNA would sell certain of its assets at a

profit in order to improve its financial condition. These actions were committed so that FIRST UNION could purchase SEBNA and SBWF in the context of a government-assisted takeover at a discounted rate.

69. FIRST UNION intentionally engaged in conduct that it knew to be prejudicial to SOUTHEAST merely to further FIRST UNION's own pecuniary interest. This conduct was known to FIRST UNION to be detrimental to SEBC's interests and explicitly contrary to FIRST UNION's oral and written representations to SEBC.

70 As a direct result of FIRST UNION's breach of fiduciary duty, SEBC suffered damages in excess of Five Hundred Million ($500,000,000) Dollars. These damages are separate and distinct in nature and amount from those damages alleged in this Complaint to have been incurred as a result of FIRST UNION's breach of the Agreement.

WHEREFORE, SEBC requests that this Court enter a judgment in favor for damages against FIRST UNION in excess of Five Hundred Million ($500,000,000) Dollars, including but not limited to all of the profits FIRST UNION has derived as a result of committing the acts alleged herein, plus all applicable interest and costs incurred by the Trustee in the prosecution of this action, and grant any such other and further relief this Court deems just and proper, such as punitive damages.

COUNT VI

Fraud In The Inducement

The Trustee incorporates the allegations contained in paragraphs 1 through 41 as though fully set forth herein.

71. This is an action for fraud in the inducement against FIRST UNION for which the Trustee is entitled to damages that exceed Five Hundred Million ($500,000,000) Dollars, exclusive of interest and costs.

72. As more fully alleged in paragraphs 1 through 41, SEBC and FIRST UNION entered into the Agreement on March 25, 1991. Pursuant to the Agreement, FIRST UNION unconditionally agreed to keep certain financial information furnished by SEBC confidential, and further agreed to use the information only

in its analysis of a possible business merger between the parties as contemplated under the Agreement.

73. FIRST UNION knew at the time it entered into the Agreement that it might well use the confidential information to exert influence on federal regulators in order to effectuate a federally-assisted takeover of SEBNA, and thus be in position to purchase SEBNA and SBWF at a discounted rate. Armed with this intent, FIRST UNION induced SEBC to provide it confidential information under the guise of conducting due diligence in connection with a proposed consensual combination with SOUTHEAST.

74. FIRST UNION made various material misrepresentations to SEBC at the time the parties entered into the Agreement. These misrepresentations included, but were not limited to, the following: that FIRST UNION would use the confidential information solely to analyze a voluntary, consensual business combination with SOUTHEAST; that FIRST UNION would not disclose the confidential information to any third party without the knowledge and consent of SEBC; and that FIRST UNION was sincerely interested in pursuing negotiations with SEBC to negotiate some form of voluntary, consensual business combination with SOUTHEAST.

75. FIRST UNION knew at the time it made the foregoing misrepresentations that the same were false and misleading, and that it would breach the proposed Confidentiality Agreement. Moreover, at the time prior to the execution of this Agreement when these misrepresentations were being made, FIRST UNION was already being advised by its outside consultants that the only transaction it should pursue was a closed-bank transaction in which FIRST UNION would shift much of the risk of loss to the FDIC in exchange for wiping out the interests of SEBC and its shareholders. Accordingly, at the time FIRST UNION entered into the Agreement and made these misrepresentations, it had no intention of using the confidential information to be provided by SOUTHEAST solely to pursue a consensual combination with SOUTHEAST; rather, FIRST UNION used these misrepresentations as an opportunity to induce SEBC to enter into the Agreement so as to gain access to SEBC's

confidential books and records and utilize the disclosed information for its own gain.

76. SEBC justifiably relied upon the foregoing false and misleading misrepresentations without knowledge of their falsity or reason to know of their falsity.

77. In reliance on FIRST UNION's misrepresentations, SEBC made its confidential financial books and records and, more importantly, those of the Banks, freely available to FIRST UNION.

78. After executing the Agreement, FIRST UNION met and communicated with regulatory agencies, including but not limited to the FDIC, the OCC and the FRB, to encourage and actively support a federal takeover of SEBNA. Upon information and belief, during these meetings and communications, all of which took place without SEBC's knowledge or consent, FIRST UNION disclosed to the federal regulators its findings derived from its review of the confidential information being provided to it by SEBC. FIRST UNION thus unduly influenced the regulators to intervene SEBNA and SBWF, further pressuring them to take expeditious action by threatening that their own interest in the Bank would diminish or disappear unless the intervention took place rapidly.

79. As a direct result of FIRST UNION's fraud in the inducement, SEBC suffered damages in excess of Five Hundred Million ($500,000,000) Dollars. These damages are separate and distinct in nature and amount from those damages alleged to have been involved as a result of FIRST UNION's breach of the Agreement.

WHEREFORE, the Trustee requests that this Court enter a judgment for damages in the amount of Five Hundred Million ($500,000,000) Dollars against FIRST UNION, including but not limited to all of the profits FIRST UNION has derived as a result of committing the acts described herein, plus all applicable interest and costs incurred by the Trustee in the prosecution of this action, and grant any such other and further relief as this Court deems just and proper, such as punitive damages.

COUNT VII

(Negligent Misrepresentation)

The Trustee incorporates the allegations contained in paragraphs 1 through 41 as though fully set forth herein.

80. This is an action for negligent misrepresentation against FIRST UNION for which the Trustee is entitled to damages that exceed Five Hundred Million ($500,000,000) Dollars, exclusive of applicable interest and costs.

81. As more fully alleged in paragraphs 1 through 41, SEBC and FIRST UNION entered into the Agreement on March 25, 1991. Pursuant to the Agreement, FIRST UNION unconditionally agreed to keep certain financial information furnished by SEBC confidential, and further agreed to use the information solely in its analysis of a possible business merger between the parties as contemplated under the Agreement.

82. FIRST UNION negligently and/or intentionally made various material misrepresentations to SEBC at the time the parties entered into the Agreement. These misrepresentations included, but were not limited to, the following: that FIRST UNION would use the confidential information solely to analyze a voluntary, consensual business combination with SOUTHEAST; that FIRST UNION would not disclose the confidential information to any third party without the knowledge and consent of SEBC; and that FIRST UNION was sincerely interested in pursuing negotiations with SEBC to negotiate some form of voluntary, consensual business combination with SOUTHEAST.

83. FIRST UNION knew at the time it made the foregoing misrepresentations that the same were false, or the misrepresentations were made under circumstances in which FIRST UNION ought to have known of their falsity. FIRST UNION either knew at the time it made the foregoing misrepresentations that the same were false and misleading or made them negligently without consideration of whether it had any intention of complying with them. Moreover, at the time prior to the execution of the Agreement that these misrepresentations were being made, FIRST UNION was already being advised by its outside

consultants that the only transaction it should pursue was a closed-bank transaction in which FIRST UNION would shift much of the risk of loss to the FDIC in exchange for wiping out the interests of SEBC and its shareholders. FIRST UNION made these misrepresentations to induce SEBC to enter into the Agreement so as to gain access to SEBC's confidential books and records and utilize the disclosed information for its own gain.

84. SEBC justifiably relied upon the foregoing false and misleading misrepresentations without knowledge of their falsity or reason to know of their falsity.

85. In reliance on FIRST UNION's misrepresentations, SEBC made its confidential financial books and records and, more importantly, those of the Banks, freely available to FIRST UNION.

86. After executing the Agreement, FIRST UNION met and communicated with regulatory agencies, including but not limited to the FDIC, the OCC and the FRB, to encourage and actively support a federal takeover of SEBNA. Upon information and belief, during these meetings and communications, all of which took place without SEBC's knowledge or consent, FIRST UNION disclosed to the federal regulators its findings derived from its review of the confidential information being provided to it by SEBC. FIRST UNION thus unduly influenced the regulators to intervene SEBNA and SBWF, further pressuring them to take expeditious action by threatening that their own interest in the Bank would diminish or disappear unless the intervention took place rapidly.

87. As a direct result of FIRST UNION's negligent misrepresentations, SEBC suffered damages in excess of Five Hundred Million ($500,000,000) Dollars. These damages are separate and distinct in nature and amount from those damages alleged to have been involved as a result of FIRST UNION's breach of the Agreement.

WHEREFORE, the Trustee requests that this Court enter a judgment for damages in the amount of Five Hundred Million ($500,000,000) Dollars against FIRST UNION, including but not limited to all of the profits FIRST UNION has derived as a result of committing the acts described herein, plus all applicable interest and costs

incurred by the Trustee in the prosecution of this action, and grant any such other and further relief as this Court deems just and proper, such as punitive damages.

COUNT VIII

(Promissory Estoppel)

The Trustee incorporates the allegations contained in paragraphs 1 through 41 as though fully set forth herein.

88. This is an action for promissory estoppel against FIRST UNION for which the Trustee is entitled to equitable relief including, but not limited to, reaping the benefits of the Agreement entered between FIRST UNION and SEBC.

89. As more fully alleged in paragraphs 1 through 41, FIRST UNION made certain promises to SEBC by which it unconditionally agreed to keep certain financial information furnished by SEBC confidential, and further agreed to use the information solely in its analysis of a possible business merger between the parties as contemplated under the Agreement.

90. FIRST UNION made various material representations to SEBC including, but not limited to, the following: that FIRST UNION would use the confidential information solely to analyze a voluntary, consensual business combination with SOUTHEAST; that FIRST UNION would not disclose the confidential information to any third party without the knowledge and consent of SEBC; and that FIRST UNION was sincerely interested in pursuing negotiations with SEBC to negotiate some form of voluntary, consensual business combination with SOUTHEAST.

91. FIRST UNION knew or should have known that these misrepresentations would induce SEBC to alter its competitive position in the banking industry by providing FIRST UNION the requested confidential information contained in SOUTHEAST's books and records.

92. SEBC justifiably relied upon the foregoing false and misleading representations without knowledge of their falsity or reason to know of their falsity.

93. In reliance on FIRST UNION's misrepresentations, SEBC changed its competitive position

in the banking industry by making its confidential financial books and records and, more importantly, those of the Banks, freely available to FIRST UNION.

94. After executing the Agreement, FIRST UNION met and communicated with regulatory agencies, including but not limited to the FDIC, the OCC and the FRB, to encourage and actively support a federal takeover of SEBNA. Upon information and belief, during these meetings and communications, all of which took place without SEBC's knowledge or consent, FIRST UNION disclosed to the federal regulators its findings derived from its review of the confidential information being provided to it by SEBC. FIRST UNION thus unduly influenced the regulators to intervene SEBNA and SBWF, further pressuring them to take expeditious action by threatening that their own interest in the Bank would diminish or disappear unless the intervention took place rapidly.

95. As a direct result of FIRST UNION's misconduct, SEBC suffered damages in excess of Five Hundred Million ($500,000,000) Dollars. These damages are separate and distinct in nature and amount from those damages alleged to have been involved as a result of FIRST UNION's breach of the Agreement.

WHEREFORE, the Trustee requests that this Court enter a judgment for damages in the amount of Five Hundred Million ($500,000,000) Dollars against FIRST UNION, including but not limited to all of the profits FIRST UNION has derived as a result of committing the acts described herein, plus all applicable interest and costs incurred by the Trustee in the prosecution of this action, and grant any such other and further relief as this Court deems just and proper, such as punitive damages.

COUNT IX

(Establishment Of Constructive Trust)

The Trustee incorporates the allegations contained in paragraphs 1 through 41 as though fully set forth herein.

96. This is an action to establish a constructive trust and obtain equitable relief against FIRST UNION.

97. By virtue of entering into the Agreement, SEBC and FIRST UNION entered into a confidential

relationship. In connection with that relationship, SEBC justifiably reposed trust and confidence in FIRST UNION. Due to the fraud and undue influence exercised by FIRST UNION, equity must impose a constructive trust to prevent FIRST UNION from being unjustly enriched at the expense of SEBC.

98. As more fully alleged in paragraphs 1 through 41, FIRST UNION's actions as stated herein are independent of, and separate from, its breach of the Agreement, insofar as FIRST UNION (1) met with federal banking regulators for the purpose of aggressively pressuring and influencing them to rapidly seize SEBNA; (2) issued false public pronouncements regarding the status, nature and purpose of its negotiations with SEBNA; and, (3) lobbied federal banking regulators to reject transactions proposed by SOUTHEAST whereby SOUTHEAST would sell certain of its assets at a profit in order to improve its financial condition. These actions were committed as part of a scheme to defraud SEBC as set forth herein so that FIRST UNION could purchase SEBNA and SBWF in the context of a government-assisted takeover at a discounted rate.

99. FIRST UNION abused its confidential relationship with SEBC by engaging in the conduct described herein and, as a result, gained an advantage over SEBC which it should not be permitted to retain under fundamental principles of equity and good conscience. SEBC seeks equitable relief because it has no adequate remedy at law.

100. Equity compels this Court to impose a constructive trust over all assets of SOUTHEAST acquired by FIRST UNION as a result of their wrongful conduct.

WHEREFORE, SEBC requests that this Court enter a judgment in favor of the Trustee placing a constructive trust over all assets acquired from SOUTHEAST by FIRST UNION as a result of its inequitable and/or fraudulent conduct and any other and further relief this Court deems just and proper.

COUNT X

(Breach Of Implied Covenant Of Good Faith And Fair Dealing)

The Trustee incorporates the allegations contained in paragraphs 1 through 41 as though fully set forth herein.

101. This is an action for breach of an implied covenant of good faith and fair dealing for which the Trustee is entitled to recover damages against FIRST UNION that exceed Five Hundred Million ($500,000,000) Dollars, exclusive of pre-judgment interest and costs.

102. As more fully alleged in paragraphs 1 through 41, SEBC and FIRST UNION entered into the Agreement on March 25, 1991. By entering into the Agreement, FIRST UNION assumed an implied duty to act in good faith and in accordance with principles of fair dealing.

103. As more fully alleged in paragraphs 1 through 41, FIRST UNION unconditionally agreed under the Agreement to keep certain financial information furnished by SEBC confidential, and further agreed to use the information only in its analysis of a consolidation transaction between the parties.

104. FIRST UNION knowingly violated its implied covenant of good faith and fair dealing by utilizing the information it obtained from SOUTHEAST in a way that was clearly outside of what was contemplated by the parties at the time the Agreement was executed by, inter alia: wrongfully disclosing the confidential information to third parties without SEBC's knowledge or consent; improperly using the information to exert pressure and influence over the FDIC, the OCC, the FRB and possibly others in its effort to effectuate a rapid and unnecessary government take-over of SEBNA and SBWF; improperly using the information in preparing its own bid package and negotiating with the FDIC to purchase SEBNA and SBWF; and making various detrimental public announcements to the effect that it would not consider acquiring SOUTHEAST in anything other than a government-assisted transaction, accelerating the withdrawal by SEBNA's depositors of substantial sums from their accounts which, in turn, further decreased SEBNA's liquidity levels and

frightened off other potential investors and merger partners in SOUTHEAST.

105. As a direct result of FIRST UNION's breach of its implied duty of good faith and fair dealing, SEBC suffered damages in excess of Five Hundred Million ($500,000,000) Dollars.

WHEREFORE, the Trustee requests that this Court enter a judgment for damages in excess of Five Hundred Million ($500,000,000) Dollars against FIRST UNION, including but not limited to all of the profits FIRST UNION has derived as a result of committing the acts described herein, plus all applicable pre-judgment interest and costs incurred by the Trustee in the prosecution of this action, and grant any such other and further relief as this Court deems just and proper.

COUNT XI

(Tortious Interference With Actual and Prospective Business Relationships)

The Trustee incorporates the allegations contained in paragraphs 1 through 41 as though fully set forth herein.

106. This is an action for tortious interference with actual and prospective business relationships for which the Trustee is entitled to recover damages against FIRST UNION that exceed Five Hundred Million ($500,000,000) Dollars, exclusive of pre-judgment interest and costs.

107. Prior to September 19, 1991, SEBC maintained countless business relationships, both directly and indirectly through the Banks, with investors, customers and depositors, and had a reasonable expectation of continuing those relationships in the future without any unjustified interference of others.

108. At all times material, FIRST UNION knew and had reason to know of these business relationships, and of SEBC's expectation of continuing those relationships in the future.

109. As more fully alleged in paragraphs 1 through 41, FIRST UNION knowingly and intentionally interfered in SEBC's business ongoing and future relationships when, independent of, and separate from, its breach of the Agreement, FIRST UNION: (1) met with

federal banking regulators for the purpose of aggressively pressuring and influencing them to seize SEBNA; (2) issued false public pronouncements regarding the status, nature and purpose of its negotiations with SEBNA; and, (3) lobbied federal banking regulators to reject transactions proposed by SOUTHEAST whereby SOUTHEAST would sell certain of its assets at a profit in order to improve its financial condition. These actions were unjustifiable in that they were committed so that FIRST UNION could purchase SEBNA and SBWF in the context of a government-assisted takeover at a discounted rate.

110. FIRST UNION unjustifiable interference ultimately destroyed SEBC's existing and prospective business relationships.

111. As a direct result of FIRST UNION's tortious conduct, SEBC suffered damages in excess of Five Hundred Million ($400,000,00) Dollars. These damages are separate and distinct in nature and amount from those damages alleged to have been involved as a result of FIRST UNION's breach of the Agreement.

WHEREFORE, the Trustee requests that this Court enter a judgment for damages in the amount of Five Hundred Million ($500,000,000) Dollars against FIRST UNION, including but not limited to all of the profits FIRST UNION has derived as a result of committing the acts described herein, plus all applicable interest and costs incurred by the Trustee in the prosecution of this action, and grant any such other and further relief as this Court deems just and proper, such as punitive damages.

DEMAND FOR JURY TRIAL

Plaintiff requests that this matter be tried before a jury.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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(2)

NO. 96-1245

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIAM A. BRANDT, JR., AS TRUSTEE OF THE CHAPTER 7 ESTATE OF SOUTHEAST BANKING CORPORATION,
Petitioner,

v.

FIRST UNION CORPORATION, A NORTH CAROLINA CORPORATION AND FIRST UNION NATIONAL BANK OF FLORIDA, A NATIONAL BANKING ASSOCIATION, AND FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS FIRST UNION CORPORATION AND FIRST UNION NATIONAL BANK OF FLORIDA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED

Following the closure of two insolvent Florida banks by federal and state regulators, First Union purchased the assets of the banks from the FDIC, as receiver for the failed financial institutions. The trustee in bankruptcy for the parent company of the banks sued First Union in tort and contract allegedly based upon First Union's pre-seizure conduct in sharing information regarding the banks with federal banking regulators. The District Court dismissed the action, finding that the trustee had no standing and that the conduct of First Union was authorized by a written agreement between First Union and the parent company. The Eleventh Circuit Court of Appeals affirmed, on grounds urged by First Union in both the District Court and the Court of Appeals, finding that because the determination of insolvency is an act committed to the discretion of the federal regulators, the trustee could not show causation for the alleged damage, and further, that because the regulators had an absolute right to the information purportedly disclosed by First Union, the trustee could not state a claim. As a result, the question presented is:

Should this Court exercise its discretionary review powers to review a decision of the Eleventh Circuit Court of Appeals affirming the dismissal of state-law based claims on causation grounds, which decision was also supported on alternative grounds as articulated by the Court of Appeals and the District Court?

LIST PURSUANT TO RULE 29.6

Respondent First Union National Bank of Florida is a wholly owned subsidiary of First Union Corporation. A list of the direct and indirect nonwholly owned subsidiaries of First Union Corporation and First Union National Bank of Florida is set forth in the Appendix (App., *infra*, pp.B1-B6).

TABLE OF CONTENTS

QUESTION PRESENTED i
LIST PURSUANT TO RULE 29.6 ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT OF PROCEEDINGS BELOW 1
REASONS FOR DENYING THE PETITION 4

A. The Eleventh Circuit Correctly Held that Under Applicable Law, the Petitioner Could Not State a Cause of Action Against First Union. 5

B. The Eleventh Circuit's Decision Creates No New Federal Common Law. 8

C. Brandt's Petition Fails to Acknowledge or Address the Alternative Basis for the Eleventh Circuit's Judgment and, as a Result, Discretionary Review is Inappropriate. 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Adams v. Board of Governors of the Fed. Reserve Bd., 855 F.2d 1336 (8th Cir. 1988) . 13

Alario v. Miller, 354 So. 2d 925 (Fla. Dist. Ct. App. 1978) 8

Atherton v. FDIC, 117 S. Ct. 666 (1997) . . . 9, 11

Barr v. Matteo, 355 U.S. 171 (1957) 13

Biscayne Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 720 F.2d 1499 (11th Cir. 1983) 6, 7

Brandt v. Bassett (In re Southeast Banking Corp.), 855 F. Supp. 353 (S.D. Fla. 1994), *aff'd in part and rev'd in part on other grounds*, 69 F.3d. 1539 (11th Cir. 1995) 8

Brandt v. Bassett (In re Southeast Banking Corp.), 827 F. Supp. 742 (S.D. Fla. 1993), *aff'd in part and rev'd in part on other grounds*, 69 F.3d 1539 (11th Cir. 1995) 8

Brandt v. FDIC, 65 U.S.L.W. 3444 (U.S. March 17, 1997) (No. 96-939) 11

Brandt v. First Union Corp. (In re Southeast Banking Corp.), 93 F.3d 750 (11th Cir. 1996) 1, 3, 4, 7, 10, 12

Briggs v. Spaulding, 141 U.S. 132 (1891) . 11

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 11

CASES

D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) 11

Dubbin v. Touche Ross & Co., 324 So. 2d 128 (Fla. Dist. Ct. App. 1975) 8

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 11

FDIC v. Irwin, 916 F.2d 1051 (5th Cir. 1990) 6, 7

Fleming v. Lind-Waldock & Co., 922 F.2d 20 (1st Cir. 1990) 6

Fried v. Easton, 293 So. 2d 87 (Fla. Dist. Ct. App. 1974) 8

Golden Pac. Bancorp v. Clarke, 837 F.2d 509 (D.C. Cir. 1988) 6

Hess v. FDIC, 117 S. Ct. 760 (1997) 11

Interstate Sec. Corp. v. Hayes Corp., 920 F.2d 769 (11th Cir. 1991) 8

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) . . 12

McAllister v. United States, 348 U.S. 19 (1954) 5

Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A., 83 F.3d 1317 (11th Cir. 1996) (en banc) 11

O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994) 9, 11

Papasan v. Allain, 478 U.S. 265 (1986) . . . 5

Rice v. Sioux City Mem'l Park Cemetery, Inc., 349 U.S. 70 (1955) 5

Snowden v. Hughes, 321 U.S. 1 (1944) . . . 5

CASES

Texas v. Mead, 465 U.S. 1041 (1984) 5

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 5

United States v. Chuang, 897 F.2d 646 (2d Cir. 1990) 13

Vacuum Indus. Pollution, Inc. v. Union Oil Co., 764 F. Supp. 507 (N.D. Ill. 1991), *aff'd*, 958 F.2d 375 (7th Cir. 1992) 6

RULES AND REGULATIONS

12 C.F.R. § 5.49 (1991) 6

Supreme Ct. R. 10(a) 4

STATUTES

12 U.S.C. § 191 6

12 U.S.C. § 248(a)(1) 13

12. U.S.C. § 1819 2

12 U.S.C. § 1821(c)(5) 6

12 U.S.C. § 1821(d)(2)(A)(i) 8

12 U.S.C. § 1844 13

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1334(b) 2

28 U.S.C. § 1452(a) 2

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App., pp.1a-5a) is reported at 93 F.3d 750. The order of the District Court (Pet. App., pp.6a-13a) is unreported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App., pp.14a-15a) was entered on September 3, 1996. A petition for rehearing was denied on November 8, 1996. (Pet. App., pp.16a-17a). The Petition for a Writ of Certiorari was filed on February 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF PROCEEDINGS BELOW

The Petitioner is William A. Brandt, Jr. ("Brandt"), as Trustee of the Chapter 7 bankruptcy estate of Southeast Banking Corporation ("Southeast"). The Respondents are First Union Corporation, its wholly owned subsidiary, First Union National Bank of Florida (collectively "First Union"), and the Federal Deposit Insurance Corporation ("FDIC"), which intervened as a party defendant in the Bankruptcy Court.

Brandt commenced the civil action that is the subject of this Petition in 1994 by the filing of the complaint (Pet. App., pp.18a-51a) in the Circuit Court of the Eleventh Judicial District in and for Dade County, Florida. Brandt alleges that First Union and Southeast entered into a written agreement relating to a potential business combination or other transactions which required that First Union maintain the information disclosed to First Union by Southeast in confidence. Brandt further alleges that Southeast provided confidential information to First Union in connection with First Union's due diligence relative to a potential transaction. The essence of Brandt's complaint is the claim that First Union improperly provided information to the federal bank regulatory authorities prompting them to close the insolvent bank subsidiaries of Southeast. *Brandt v. First Union Corp. (In re Southeast Banking Corp.)*, 93 F.3d 750, 751 (11th Cir. 1996); (Pet. App., pp. 23a-31a; ¶¶15-35). Brandt alleges

that such action by First Union violated the written agreement between Southeast and First Union and gave rise to other state law claims against First Union. (*Id.*)

First Union removed the action to the United States Bankruptcy Court for the Southern District of Florida where the Chapter 7 case of Southeast was pending. *See* 28 U.S.C. § 1452(a). The reference of the matter was subsequently withdrawn by the District Court. (Pet. App., p.6a). Jurisdiction of the District Court was based upon "related to" jurisdiction under 28 U.S.C. § 1334(b) and based upon the FDIC's presence as a party in the action under 12 U.S.C. § 1819. First Union asserted a third-party complaint against the FDIC in its corporate capacity based upon the indemnification provisions in the agreement whereby the FDIC sold to First Union the assets of the failed banks. (App, *infra*, p.A3). The FDIC also intervened in the action and on January 25, 1995, the District Court issued an Omnibus Order striking First Union's third-party complaint against the FDIC pursuant to Rule 14(a) of the Federal Rules of Civil Procedure (the "Rules"), but permitting the FDIC's intervention as a party defendant. (App., *infra*, p.A2). Both First Union and the FDIC moved to dismiss Brandt's complaint pursuant to Rule 12(b)(6).

By Order dated April 24, 1995, the District Court dismissed Brandt's complaint in its entirety and directed the case to be closed for administrative purposes. (Pet. App., pp.12a-13a). The District Court found that Brandt had alleged claims that were entirely derivative of any harm to the subsidiary banks and that Brandt did not allege any injury to Southeast, the holding company, independent of the subsidiary banks. (Pet. App., pp.11a-12a). As a result, Brandt did not have standing to assert the claims in his complaint. Although not mentioned by Brandt in his Petition, the District Court also addressed the merits of one count of the complaint. As to the breach of the so-called "standstill" provision contained in the written agreement between First Union and Southeast, even assuming standing, the District Court found that the agreement provided an

exclusion for "federally assisted regulatory transactions" which was completely applicable to the circumstances of the case and, as a result, barred any recovery by Brandt. (Pet. App., p.12a). Brandt appealed the dismissal of the Complaint to the Eleventh Circuit Court of Appeals and First Union cross-appealed the order striking the third-party complaint against the FDIC. (Pet. App., p.3a).[1]

The Eleventh Circuit affirmed the judgment of the District Court on a separate ground — that Brandt did not and could not establish causation for any damages allegedly resulting from First Union's alleged pre-seizure conduct. This alternative ground for dismissal of Brandt's complaint was raised by First Union and the FDIC in the District Court and the Eleventh Circuit. Far from extending any immunity under the discretionary function bar of the Federal Tort Claims Act, the Circuit Court held that causation was absent in its holding that: "[n]evertheless, '[o]nly the Comptroller's final decision damaged [the Holding Company,] and no prior act or acts could have so caused the damaged [alleged to have occurred by First Union] without the ultimate declaration of insolvency.' " *Brandt v. First Union Corp. (In re Southeast Banking Corp.)*, 93 F.3d 750, 751 (11th Cir. 1996); (Pet. App., p. 4a).

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[1] First Union timely appealed the order of the District Court striking its third-party complaint against the FDIC. Thus, Brandt's statement in his Petition (Petition, p.21, n.10), to the effect that the FDIC had no indemnity obligation to First Union that relates to Southeast's claims against First Union is incorrect. The Eleventh Circuit determined that the issue was moot and did not reach the propriety of the order striking the third-party complaint. (Pet. App., p.3a).

The Circuit Court also based its decision on an alternative ground — that information allegedly "leaked" to the regulators and First Union's own subjective analysis of that information could not be used to establish a claim as the Court held that: "[n]or can [Brandt] sue First Union for 'precipitating' the government's ultimate action by disclosing information the government was entitled to have." *Id.* at 752; (Pet. App., p.5a).

REASONS FOR DENYING THE PETITION

Brandt fails to meet the requirements for discretionary review in this case. Brandt does not argue or allege that the decision of the Eleventh Circuit Court of Appeals conflicts with a state court of last resort or conflicts with a decision of another Circuit Court of Appeals on the same important matter. *See* Sup. Ct. R. 10(a). Rather, Brandt attempts to create an important federal question where there is none. Brandt stretches and strains the Eleventh Circuit's opinion in this case to conjure up the chimera of federal common law in order to present his Petition. The Eleventh Circuit did not create or extend federal common law to protect First Union. The Court of Appeals determined that under applicable law, Brandt failed to state a claim as Brandt did not, and could not, state causation. The parties did not argue or brief federal common law in the District Court or in the Court of Appeals and the matter was not addressed by the Eleventh Circuit. Finally, Brandt failed to address in his Petition the alternative ground for the judgment of the Circuit Court. This alternative ground, that First Union could not be sued for precipitating the government's ultimate action by disclosing to the banking regulators information those regulators were entitled to have, does not raise, even under Brandt's strained analysis, any issue of federal common law or any issue requiring discretionary review by this Court. Accordingly, this Court should deny Brandt's Petition.

A. The Eleventh Circuit Correctly Held that Under Applicable Law, the Petitioner Could Not State a Cause of Action Against First Union.

It is axiomatic that discretionary review of a decision of a Circuit Court of Appeals by way of certiorari will only be granted in cases involving principles, the settlement of which is of importance to the public, as distinguished from merely those of importance to the parties. *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). As a consequence, certiorari is not granted to review evidence or discuss specific facts. *See Texas v. Mead*, 465 U.S. 1041 (1984). *See also McAllister v. United States*, 348 U.S. 19, 23 (1954) (Frankfurter, J., dissenting) (discretionary review should not be applied to cases involving interpretation of facts bearing on the issues of causation or negligence). The proper disposition of the appeal by the Eleventh Circuit in the instant case involved only a matter of interest to the private litigants as the Circuit Court correctly held that under applicable law, Brandt could not state causation for any alleged harm to Southeast. As a result, Brandt's Petition should be denied.

In dismissing Brandt's complaint, both the District Court and the Eleventh Circuit relied solely on the facts alleged in Brandt's complaint.[2] The opinion of the Eleventh Circuit does not purport to announce any broad holding of so-called private immunity for First Union, or indeed for any other party. Brandt's complaint sets forth that Southeast Bank, N.A., the

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[2] Although for the purposes of a motion to dismiss, the Court of Appeals was to presume that all factual allegations in Brandt's complaint were true, the Court was not bound to accept as true legal conclusions couched as factual allegations. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986). *See also Snowden v. Hughes*, 321 U.S. 1, 10 (1944) (opprobrious epithets and unsupported characterizations add nothing to the plaintiff's complaint). In construing the allegations contained in Brandt's complaint and in affirming the District Court's dismissal, the Court of Appeals properly disregarded Brandt's overheated rhetoric and focused instead on the dispute between the parties.

lead bank subsidiary of Southeast, was a troubled bank with a significant proportion of nonperforming loans, well-publicized losses and nervous depositors. (Pet. App., p.21a, ¶ 8). First Union engaged in discussions with Southeast relating to the possible acquisition of Southeast's subsidiary banks, and performed due diligence on those troubled banks. Due to its problems, Southeast Bank had to borrow more than $500,000,000 from the lender of last resort, the Federal Reserve Bank of Atlanta (the "FRB"), and when the FRB demanded repayment, it was unable to comply. (Pet. App., p.31a, ¶ 34). As a result, Southeast Bank was insolvent as a matter of law and the OCC properly closed it. *See* 12 U.S.C. § 191 and 12 C.F.R. § 5.49 (1991) [subsequently superseded by 12 U.S.C. § 191 and 12 U.S.C. § 1821(c)(5)]. The intervention by the regulators of an admittedly insolvent financial institution cut off any causal connection between any alleged conduct on the part of First Union and any alleged damage to the holding company, Southeast. Once the statutory grounds for the appointment of receiver have been shown, any "judicial inquiry ends." *Biscayne Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 720 F.2d 1499, 1505 (11th Cir. 1983). *See also FDIC v. Irwin*, 916 F.2d 1051, 1055 (5th Cir. 1990) (focusing on causation and determining that no prior acts could have damaged the plaintiff without the ultimate declaration of insolvency); *Golden Pac. Bancorp v. Clarke*, 837 F.2d 509 (D.C. Cir. 1988).

The Court of Appeals properly considered the issue of proximate cause on the Rule 12(b)(6) motions of First Union and the FDIC. *See, e.g., Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 24 (1st Cir. 1990) (court addressed the proximate cause issue on defendant's motion to dismiss); *Vacuum Indus. Pollution, Inc. v. Union Oil Co.*, 764 F. Supp. 507, 511-12 (N.D. Ill. 1991), *aff'd*, 958 F.2d 375 (7th Cir. 1992) (determining that plaintiff failed to state a cause of action as plaintiff could not allege a causal relationship between the alleged contractual breaches and plaintiff's damages). The Circuit Court correctly held that Brandt's admission of insolvency renders irrelevant

Brandt's allegations concerning First Union's conduct.[3] *See, e.g., Biscayne Fed.*, 720 F.2d at 1503-05 (once the statutory grounds for appointment of a receiver was stipulated to by the parties, the court rejected any claims relating to the "outlandish" or "outrageous" conduct of the regulators prior to the closure of the institution). In addressing this issue, the Eleventh Circuit in this case held that:

> Contending that Southeast Bank was liquid and should not have been closed by regulators, and being unable to sue federal regulators for their discretionary act of closing the bank, the Holding Company instead claims that the closure was precipitated by First Union's disclosures of confidential information to the federal regulators. Nevertheless, "[o]nly the Comptroller's final decision damaged [the Holding Company,] and no prior act or acts could have so caused the damage [alleged to have occurred by First Union] without the ultimate declaration of insolvency." *FDIC v. Irwin*, 916 F.2d 1051, 1055 (5th Cir. 1990). The Comptroller's decision is not an act for which First Union can be held liable. *See Id.*, at 1053-56.

Southeast Bank, 93 F.3d at 751; (Pet. App., p.4a).

The Eleventh Circuit conducted a thorough and searching inquiry of Brandt's complaint and determined that Brandt did not, and could not, state a causal connection between the

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[3] Brandt's inability to state a cause of action absent the regulatory intervention of the subsidiary banks is illustrated at p.3 of his Petition where he states that "[a]s a result of First Union's persistent and persuasive efforts, the regulators . . . finally closed the banks in September of 1991." (Petition at p.3). At p.22 of Brandt's Petition, he contends that a claim against First Union "might include evidence of the banks' actual solvency at the time of the closure . . . " (Petition at p.22). Given the admission that in fact the subsidiary banks were insolvent, Brandt's argument that his complaint is based upon something other than the regulatory closure of the banks and the sale of the assets to First Union was rightly rejected by the Eleventh Circuit.

alleged conduct of First Union and its alleged damage.[4] Brandt has made no allegation or argument that the Eleventh Circuit misread his complaint. The judgment of the Eleventh Circuit, in affirming the dismissal of Brandt's complaint, settled a dispute arising between two private litigants in accordance with well-settled principles of law. As a result, no grounds exist for discretionary review of the opinion by this Court.

B. The Eleventh Circuit's Decision Creates No New Federal Common Law.

The focus of Brandt's argument is on the unsupportable proposition that the Eleventh Circuit's opinion below creates a

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[4] Moreover, the District Court's dismissal of Brandt's complaint may be affirmed on a number of other grounds. As noted in the District Court's Order, the claims and causes of action asserted by Brandt in the complaint are owned exclusively by the FDIC as receiver and may not be asserted by Brandt. *See* 12 U.S.C. § 1821(d)(2)(A)(i); *Brandt v. Bassett (In re Southeast Banking Corp.)*, 827 F. Supp. 742 (S.D. Fla. 1993), *aff'd in part and rev'd in part on other grounds*, 69 F.3d 1539 (11th Cir. 1995); *Brandt v. Bassett (In re Southeast Banking Corp.)*, 855 F. Supp. 353 (S.D. Fla. 1994), *aff'd in part and rev'd in part on other grounds*, 69 F.3d. 1539 (11th Cir. 1995); *Fried v. Easton*, 293 So. 2d 87 (Fla. Dist. Ct. App. 1974); *Alario v. Miller*, 354 So. 2d 925, 926 (Fla. Dist. Ct. App. 1978). *See also Dubbin v. Touche Ross & Co.*, 324 So. 2d 128, 129 (Fla. Dist. Ct. App. 1975) (alleged third-party beneficiary's contract with defendant failed to state cause of action where damage, if any, was to the corporation). Further, as the District Court properly held, the written agreement between First Union and Southeast explicitly authorized the conduct of First Union alleged in the complaint. The tort-based claims asserted by Brandt also fail under the Florida economic loss rule. *See Interstate Sec. Corp. v. Hayes Corp.*, 920 F.2d 769, 774 (11th Cir. 1991). Finally, Brandt's intimation that his claims could well have been asserted by Southeast against First Union had there been no intervention and sale of the banks' assets (Petition, p.10, n. 3, and p.22) was expressly considered and rejected by the Court of Appeals. (Pet. App., p.4a). In his complaint, Brandt has only alleged that First Union "asserted influence", made public statements which made it "more difficult" for the banks to surmount their economic problems and that ultimately First Union's "wish was granted" when the FDIC sought bids for a federally-assisted sale of the assets of the subsidiary banks. (Pet. App., pp.24a, 27a, 28a-30a, ¶¶ 17, 24, 27 and 32).

federal common law rule to grant "immunity" to a private party. Brandt engages in an impressive, but irrelevant, analysis of the recent authority relating to the creation of federal common law to bolster his position; however, Brandt simply misses the import and the effect of the ruling of the Circuit Court in this regard: the Circuit Court's decision had nothing to do with federal common law.

Brandt relies heavily on the recently-decided case of *Atherton v. FDIC*, 117 S. Ct. 666 (1997), for the proposition that this Court has "reaffirmed and revitalized" the precept that only in a few and restricted instances may federal courts create a federal common law rule of decision and thereby displace state law. (Petition at p. 7). Brandt's reliance on *Atherton* and its predecessor, *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994), is unavailing. In both *O'Melveny* and *Atherton*, the FDIC sought the imposition of a federal common law rule applicable to situations in which the FDIC, as receiver for a failed financial institution, was asserting claims against former officers and directors of the failed institution or against its professionals, such as the institution's counsel. In both situations, the FDIC actively argued for the imposition of a federal common law rule of decision governing actions against the failed financial institution's officers and directors and/or its counsel.

In stark contrast, the parties below did not argue for a "federal common law" immunity for First Union. Instead, the issue was framed in terms of the inability of Brandt to state a claim because he had failed to plead proximate cause and that an intervening act, namely the admittedly proper regulatory closures of the insolvent banks, cut off any causal connection between the alleged conduct of First Union and the alleged damage (the loss and the value of the stock of the subsidiary banks). The opinion of the Eleventh Circuit does not address federal common law, nor undertake to analyze the issue of federal common law under *O'Melveny* or its antecedents. Instead, and quite naturally, the Eleventh Circuit focused on the

allegations in Brandt's complaint and whether First Union could be held liable where the sole cause of the alleged damage was not linked to any conduct on the part of First Union. The Eleventh Circuit held that it could not for two reasons. First, the damage, if any, was caused by the admittedly proper regulatory closure of the banks. Second, the basis of First Union's alleged liability — its disclosure of information about the financial condition of Southeast's insolvent banks — was information "the government was entitled to have." *Southeast Bank*, 93 F.3d at 752; (Pet. App., p.5a). The District Court had, of course, found that First Union could not be liable to Brandt for two independent reasons. First, the Court held that Brandt did not have standing to bring the derivative claims of the shareholder of the banks. (Pet. App., pp.9a-12a). Brandt, in his capacity as trustee for the holding company, brought the action on behalf of that holding company, and not the subsidiary banks, and the District Court found that as to the alleged harm, only the FDIC has standing. Second, the District Court determined that the written agreement between the parties authorized First Union's alleged conduct and barred any recovery by Brandt. (Pet. App., p.12a).

The Circuit Court's opinion does not address federal common law and does not implicate this Court's decisions in

O'Melveny and *Atherton*.[5] In his Petition, Brandt has stretched and strained the Circuit Court's opinion in a vain attempt to articulate an important federal question that should be reviewed and considered by this Court. The Eleventh Circuit's narrow, fact-specific decision simply did not create any federal common law or any general rule of decision applicable beyond the four corners of Brandt's complaint. Brandt's speculation

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[5] At footnote 9 of his Petition, Brandt suggests that this Court has vacated and remanded "another recent Eleventh Circuit common law making decision for reconsideration in light of *Atherton*." However, the decision of the Eleventh Circuit in *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 83 F.3d 1317 (11th Cir. 1996) (en banc), *vacated and remanded sub nom. Hess v. FDIC*, 117 S. Ct. 760 (1997), addressed an entirely different question: whether the common-law doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (decided some 14 years after *Erie, infra*) survived as a valid federal common law rule in the aftermath of Congress' enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304, 316-19 (1981) (analyzing whether federal statutory law governs a question previously the subject of federal common law). The issue in *O'Melveny* was whether or not the Court would create a new federal rule of decision for imputation of knowledge where the FDIC was asserting a claim as receiver for a failed financial institution. In *Atherton*, the question was slightly different: whether the federal common law standard for directors and officers of a federally-chartered bank announced in *Briggs v. Spaulding*, 141 U.S. 132 (1891), survived this Court's holding in *Erie Railroad. Co. v. Tompkins*, 304 U.S. 64 (1938). In *Atherton*, the Court concluded that the federal common law standards enunciated in *Briggs* did not survive *Erie* and that there was no need for the creation of federal common law with respect to the standard of care for officers and directors of federally-chartered banks. *Atherton*, 117 S.Ct. at 674. Each of these three cases raise questions different from the question presented by Brandt's Petition here. Thus, Brandt's citation to the *Motorcity* case mischaracterizes its holding and its relevance to the instant case. Moreover, on March 17, 1997, this Court granted Brandt's petition for a writ of certiorari in an unrelated action against the FDIC. *Brandt v. FDIC*, 65 U.S.L.W. 3444 (U.S. Mar. 17, 1997) (No. 96-939). That case also addressed whether the so-called *D'Oench* doctrine survived the enactment of FIRREA. The Court's disposition of Brandt's petition for a writ of certiorari in that matter has no relevance to the instant Petition.

and surmise to the effect that would-be predators will decimate the banking industry are unsupported by any fact in the record and any legal authority whatsoever. The so-called "blunt tool created by the Eleventh Circuit" apparently has not[6] and will not cut any "swath across the judicial landscape." (Petition, p.25). Brandt has simply failed to articulate for this Court any basis for discretionary review of the Eleventh Circuit's judgment, which was proper on the facts alleged in Brandt's complaint and the law applicable to the dispute.

C. Brandt's Petition Fails to Acknowledge or Address the Alternative Basis for the Eleventh Circuit's Judgment and, as a Result, Discretionary Review is Inappropriate.

Finally, Brandt entirely neglects the alternative basis for the affirmance of the District Court's dismissal of the case. At the end of its opinion, the Eleventh Circuit indicates that a cause of action could not be brought against First Union for "precipitating" the government's ultimate action by disclosing information that the government was entitled to have. *Southeast Bank*, 93 F.3d at 752. (Pet. App., p.5a). Brandt's federal common law argument does not address this alternative ground for the decision of the Eleventh Circuit and, for this separate reason, this Court should deny Brandt's Petition. Even if the Court were to grant Brandt's Petition and determine that the Circuit Court somehow improperly created federal common law, the Eleventh Circuit articulated independent grounds for the affirmance of the dismissal of Brandt's claims. Accordingly, addressing Brandt's defective Petition would be a meaningless act. *See, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips*

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[6] Indeed, if Brandt's claims relative to this fundamental shift in federal-state power were correct, one would expect that the decision below would have been discussed, or even mentioned, by the courts in the intervening seven months since the entry of the Circuit Court's judgment on September 3, 1996. In fact, not one published decision has been rendered which discusses, or even mentions, the decision below.

Corp., 510 U.S. 27, 32-34 (1993) (dismissing the writ of certiorari as improvidently granted where it appeared that the petitioner failed to preserve the issue of its intervention in the case before the Circuit Court of Appeals); *Barr v. Matteo*, 355 U.S. 171, 172-73 (1957) (recognizing that the Court's duty is to confine itself to the proper exercise of its jurisdiction and that an advisory opinion should not be issued).

As a matter of law, the OCC and the Federal Reserve are accorded broad supervisory authority to examine the accounts, books and affairs of national banks (which would include First Union). *See* 12 U.S.C. § 248(a)(1) and 12 U.S.C. §1844. *See also Adams v. Board of Governors of the Fed. Reserve Bd.*, 855 F.2d 1336 (8th Cir. 1988) (Federal Reserve Board had power to review and examine specific customer account information without compliance with notice and procedural requirements of the Right to Financial Privacy Act); *United States v. Chuang*, 897 F.2d 646 (2d Cir. 1990) (bank CEO had no legitimate expectation of privacy related to bank documents in question as they were subject to periodic examination by the OCC, which has a statutory duty to examine the affairs of every national bank). The federal regulators had access to all of the information allegedly given to those regulators by First Union. Both the FDIC and First Union argued in the District Court and in the Circuit Court that no breach of the alleged duty of confidentiality could have occurred as the government was fully entitled to the allegedly confidential information. Further, both the FDIC and First Union argued that under Florida contract law, the agreement between First Union and Southeast could not be construed to prohibit First Union from disclosing information to the regulators. On this alternative ground, the Eleventh Circuit properly held that no cause of action would lie. Beyond doubt, there is no issue of federal common law in this context. Brandt's failure to address and preserve this issue precludes discretionary review of the Eleventh Circuit's judgment through certiorari.

CONCLUSION

For all of these reasons, this Court should deny the Petition for a Writ of Certiorari requested by William A. Brandt, Jr., as Trustee for the Chapter 7 Estate of Southeast Banking Corporation.

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April 9, 1997

APPENDICES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 94-1803-CIV-HURLEY

WILLIAM A. BRANDT, JR.,)
Plaintiff,)
v.)
FIRST UNION CORP. et al.,)
Defendants.)

OMNIBUS ORDER

These matters come before the court upon the following motions:

1) Federal Deposit Insurance Corporation's motion to intervene as a party defendant, and for extension of time to file Rule 24(c) pleading;

2) Plaintiff's motion to strike third-party complaint;

3) Federal Deposit Insurance Corporation's motion to strike third-party complaint; and

4) Plaintiff's motion for abstention and/or to remand.

Upon consideration of these motions, all memoranda filed in response thereto, and relevant portions of the record, the court concludes the following.

I. FDIC'S MOTION TO INTERVENE

The Federal Deposit Insurance Corporation ("FDIC") seeks to intervene pursuant to Rule 24(a) and/or 24(b) of the Federal Rules of Civil Procedure. FDIC cites a number of bases upon which it should be allowed to intervene,[1] the most persuasive of which is that plaintiff and defendant have placed at issue in this case the terms and conditions under which FDIC may

[1] As is discussed below, one of the bases asserted to support intervention is made moot by this order.

pursue a potential acquisition/failure transaction with an interested party. Given that fact, it is clear that FDIC has an interest in questions of both law and fact raised in the main action.[2] Furthermore, there can be little doubt that FDIC is better suited to identify any government policies implicated by this action, and defend the government's interest in advancing those policies, than is defendant. Finally, there is no indication that allowing FDIC to intervene will unduly delay or prejudice the adjudication of the rights of the original parties. Accordingly, intervention under Rule 24(b)(2) is proper.

II. MOTION TO STRIKE THIRD-PARTY COMPLAINT

Both plaintiff and FDIC move to strike the third-party complaint,[3] arguing that is it wholly meritless. The court begins by noting that motions to strike are disfavored under the Federal Rules. They are only to be granted where the matters sought to be omitted have no possible relationship to the controversy, may confuse the issues or otherwise prejudice a party.[4] However, where these conditions are satisfied, motions to strike a useful means of narrowing the issues in an action, saving time

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[2] Rule 24(b)(2) permits intervention "when an applicant's claim or defense [as set forth in a pleading filed in conformance with Rule 24(c)] and the main action have questions of law or fact in common." FDIC has not yet filed a Rule 24(c) pleading. However, it cites a number of potential defenses in its memorandum in support of its motion to intervene, and seeks an extension of time to file the Rule 24(c) pleading. The extension was apparently made necessary by the peculiar posture of this action. However, this order should eliminate any ambiguities regarding the interests of the respective parties, thereby clearing away any obstacles to the prompt filing of FDIC's claim or defense pleading in conformance with Rule 24(c).

[3] Under Rule 14(a) of the Federal Rules of Civil Procedure, "[a]ny party may move to strike the third-party claim."

[4] See, Augustus v. Board of Public Instruction of Escambia County, 306 F.2d 862, 868 (5th Cir. 1962); R.T.C. v. Youngblood, 807 F. Supp. 765 (N.D. Ga. 1992); R.T.C. v. Holland & Knight, 832 F.Supp. 1532, 1533 (S.D. Fla. 1993).

and expense, and avoiding confusion.[5] In this case, the indemnity claim set forth in the third-party complaint is wholly meritless. Consequently, granting the motion is completely appropriate, as striking the third party complaint will eliminate any litigation on the issue of indemnity, saving time and expense, avoiding confusion.[6] In the third-party claim, First Union relies upon Article XIV of an assistance agreement it entered into with FDIC in September of 1991. The validity and text of that agreement are not disputed. Section 1 of that Article provides as follows:

> 14.1 Indemnification of Indemnitees. From and after the Commencement Date and subject to compliance by the Indemnitees with the provisions of Section 14.2, the Corporation hereby agrees to indemnify and hold harmless against any and all costs, losses, liabilities, expenses (including attorneys' fees incurred prior to the assumption of defense by the Corporation pursuant to clause (4) of Section 14.2), judgements fines and amounts paid in settlement actually and reasonably incurred in connection with claims against any Indemnitee *based on liabilities of the Failed Bank that are not assumed by the Assuming Bank* pursuant to this agreement or subsequent to the execution hereof by the Assuming Bank or any Subsidiary or Affiliate of the Assuming Bank, which unassumed liabilities remain with the Receiver. Such claims for which indemnification is provided hereunder include, without limitation, the following claims set forth in paragraphs (1) through (11), subject to certain exclusions as provided in paragraphs (a) through (i) of this Section 14.1:

(emphasis added.)

The agreement then specifies eleven categories of claims covered by the indemnification clause. Defendant argues that

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[5] Holland & Knight, 832 F. Supp. at 1533.

[6] Youngblood, 807 F. Supp., at 765.

the claims at issue in this action may fall into at least four of these eleven categories. Reading the language of those four category descriptions in isolation, defendant's argument might be understandable, as those categories provide for coverage of:

> (1) claims based upon the rights of any shareholder or former shareholder as such of (x) the Failed Bank or (y) any Subsidiary or Affiliate of the Failed Bank;...
>
> (5) claims based upon any determination of insolvency and the closing of the Failed Bank by the appropriate regulatory authority;
>
> (6) claims based on the execution and delivery of this Agreement and the consummation of the transactions contemplated thereby;...
>
> (9) claims arising from any action or inaction of any Indemnitee which is taken upon the specific written direction of the Corporation or the Receiver, other than any action or inaction taken in a manner constituting gross negligence or willful misconduct;...

However, these categories cannot be read in isolation. Each must be read in conjunction with the main text of Section 14.1, which limits indemnification to those claims that are *based on liabilities of the Southeast Bank* not otherwise assumed by defendant. It is an elementary tenet of contract law that the subsidiary clauses of the Article must be read to comport with its main text.

Applying this reading of the agreement, it is clear that defendant has no claim for indemnification against FDIC. While plaintiff might not have brought this action were it not for defendant's acquisition of Southeast, the potential liability to which defendant became exposed as a result of its alleged conduct in preparation for acquisition of Southeast was not at any time Southeast's. At all times it has been defendant's alone. Stated another way, plaintiff neither alleges misconduct on the part of, nor claims a right to relief from Southeast. Accordingly,

the third-party complaint is completely groundless, and should be stricken.

III. MOTION FOR ABSTENTION AND/OR REMAND

Defendant acknowledges that the presence of the FDIC in this action provides a basis for federal subject-matter jurisdiction under 12 U.S.C. § 1819 (b) (2) (B). Thus, as FDIC is a party defendant to this action, the action is properly before this court.[7]

In accordance with the foregoing conclusions, it is hereby ORDERED and ADJUDGED as follows:

1) Federal Deposit Insurance Corporation's motion to intervene as a party defendant, and for extension of time to file Rule 24(c) pleading, is GRANTED. FDIC is directed to file a Rule 24(c) pleading within fifteen (15) days of entry of this order.

2) Plaintiff's motion to strike third-party complaint is GRANTED;

3) Federal Deposit Insurance Corporation's motion to strike third-party complaint is DENIED as MOOT; and

---

[7] Lazuka v. FDIC, 931 F.2d 1530, 1535 (11th Cir. 1991).

4) Plaintiff's motion for abstention and/or to remand is DENIED as MOOT.

DONE and SIGNED in Chambers at West Palm Beach, Florida this 25 day of January, 1995.

DANIEL T. K. HURLEY
United States District Judge

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FIRST UNION CORPORATION

LIST OF DIRECT AND INDIRECT NONWHOLLY OWNED SUBSIDIARIES

PURSUANT TO Sup. Ct. R. 29.6

ABCA, Inc.
Melbourne Atlantic Venture Partners

Austin Ventures IV - A.L.P.

Canaan Ventures II

Carousel Capital Partners, L.P.

Center Street Capital Partners, L.P.

Chartwell Capital Investors, L.P.

DeMuth, Folger & Wetherill, L.P.

Education Financing Services, LLC

— Housing Equity Fund of Virginia I, L.P.
— Montgomery Homes L. P. IX
— Parkchester Limited Partnership
— Pendleton Pines Associates, LLC
— Roanoke Community Development Corporation
— Sycamore Row, LLC

— Ashton of Richmond Hill, L.P.
— Athens Rental Housing, L.P.
— NOVA Corporation
— Peppermill Partners, L.P.
— Rome Rental Housing, L.P.
— Sandlewood Terrace of Ludowici L.P.
— Statesboro Rental Housing, L.P.
— Sugar Mill Apartments, L.P.

— First Fidelity Incorporated
— Brynwood Partners, I, L.P.
— Andalusia Senior Housing, L.P.
— Beaumont Avenue Apartments, L.P.

— Chambers Bridge Urban Renewal Housing, L.P.
— Cranford Avenue Apartments, L.P.
— Equitable Realty Associates, L.P.
— Communications Systems Technologies, Inc.
— MaxFlight Technologies, Inc.
— National Resource Directories, Inc.
— Allentown Development Company, Inc.
— NOVA Corporation
— Hamilton Manor Limited Partnership
— Orianna Street Limited Partnership
— St. Joseph's Affordable Housing Limited Partnership
— Northeast Bancorp Inc.
— Radnor Venture Partners, L.P.
— TDH II Limited
— First Union NOVA Holdings of Connecticut, Inc.
— NOVA Corporation
— Arbor Village, L.P.
— Business Development Corporation of South Carolina
— First Union NOVA Holdings of SC, Inc.
— NOVA Corporation
— Atlantic Venture Partners II, L.P.
— Long, Travers & FASC
— Woodlawn Joint Venture
— First Union NOVA Holdings of TN, Inc.
— NOVA Corporation
— Fairbrooke Apartments Limited Partnership
— Fountain Place Associates Limited Partnership
— First Union NOVA Holdings of MD, Inc.
— NOVA Corporation

— 1560 Wilson Boulevard Limited Partnership
— Arbor Glenn L.P.
— Bowler Housing L.P.
— BR Limited Partnership
— Cannon/Heartwood Limited Partnership
— Fairfax County Redevelopment and Housing Authority/HCDC One L.P.
— Fairfax County Redevelopment and Housing Authority/HCDC Two L.P.
— First Union NOVA Holdings of VA, Inc.
  — NOVA Corporation
— First Union Capital Partners, Inc.
  — Arcon HealthCare, Inc.
  — Atlantic Spinners, Inc.
  — Chattem, Inc.
  — Cybergenics Holding, Inc.
  — Electronic Manufacturing Systems, Inc.
  — Envoy Corporation
  — FrontierVision Partners, L.P.
  — FVP GP, L.P.
  — Heartland Port Enterprises, Inc.
  — Meigher Communications, L.P.
  — Renal Disease Management by Physicians, Inc.
  — Right Source, Inc.
— Homes for Fredericksburg Limited Partnership
— Housing Equity Fund of Virginia II, L.P.
— International Progress, Inc.
— Lafayette Family L.P.
— Martin's Landing Limited Partnership
— Martin's Landing II Limited Partnership
— Savings Associations Financial Enterprises, Inc.
— Salem Run Associates, L.P.
— Shenandoah Valley Properties L.P.
  — Craigmont II, L.P.

— Elkmont Partners, L.P.
— Grottoes Partners L.P.
— Willow Lake Partners, L.P.
— Tobacco Row Phase II Associates, L.P.
— WNB Corporation
— William Byrd Hotel Associates, L.P.
— First Union NOVA Holdings of DC, Inc.
— NOVA Corporation
— Savings Associations Financial Enterprises, Inc.
— HONOR Technologies, Inc.
— Virginia Baseball Club, L.P.

The First Service Corporation of South Carolina
— Arrowwood Associates

— Chisholm Partners III, L.P.
— Commonwealth Investors II, L.P.
— High Ridge Capital Partners Limited Partnership
— HRC General Partners Limited Partnership
— Kinder Morgan Energy Partners, L.P.

— Argo Partnership, L.P.
— Farmington, Incorporated
— Ghent-Farmington Associates
— The Fairfax Corporation
— Interchange Partners
— North Ridge, Inc.
— Real Estate Consultants of the South, Inc.

— 100 Block Associates Limited Partnership
— Barrett Place Limited Partnership
— Beechridge Limited Partnership
— CT I Limited Partnership
— First Stratford Partnership
— First Union Rail Corporation
— Ironbrand Capital LLC
— First Wells Fargo Leasing Partnership
— Ironbrand Capital LLC
— Multiplex Leasing Partners

— Besso Holdings Limited

— First Union HKCB Asia, Ltd.

— 100 Block Associates Limited Partnership

— NOVA Corporation

— Flagship Partners, L.P.

— Fox Haven Limited Partnership

— C4 Media Cable South, Limited Partnership

— C4 Media Cable South, Limited Partnership

— Glen Royall Mill Limited Partnership

— Golfview Associates Limited Partnership

— Green Ridge Associates, LLC

— Oak Crest Apartments of Kannapolis, Ltd.

— NNI Bell Street Limited Partnership

— Southwoods Limited Partnership

— Yorktown Arms Development Limited Partnership

Franklin Ventures III, L.P.

HONOR Technologies, Inc.

Kinder Morgan, Inc.

Media/Communications Partners

Morgan Stanley Bridge Fund, LLC

Pacific Venture Group, L.P.

Phillips-Smith Specialty Retail Group III, L.P.

FIRST UNION NATIONAL BANK OF FLORIDA
LIST OF DIRECT AND INDIRECT NONWHOLLY OWNED
SUBSIDIARIES PURSUANT TO Sup. Ct. R. 29.6

— Cantebury of Hilliard, Ltd.
— Creative Choice Homes IX, Ltd.
— Ellenton Housing Associates, Ltd.
— First Union NOVA Holdings of FL, Inc.
  — NOVA Corporation
— Floral Oaks Apartments, Ltd.
— General Homes Corp.
— Greenleaf Village of Groveland, Ltd.
— Indian Run Limited Partnership
— Jacksonville Affordable Housing, Ltd.
— Lantana Associates, Ltd.
— Ravenwood of Kissimmee, Ltd.
— Rosemont Manor Ltd.
— River Reach of Orange County, Ltd.
— Savings Associations Financial
  Enterprises, Inc.
— Spinnaker Reach Apartments of Duval, Ltd.
— Spring Gate Manor Limited
— Steeplechase Apartments, Ltd.
— TWC Eighty-Eight, Ltd.
— TWC Ninety-Six, Ltd.
— VCP-Alderman Park Partners, Ltd.
— Vestcor - WR Associates, Ltd.
— Villa Biscayne of South Dade, Ltd.
— Waterford Manor, L.P.
— West Brickell Apartments, Ltd.
— Westville, Ltd.

Supreme Court, U.S.
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No. 96-1245

In the Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM A. BRANDT, JR., ETC., PETITIONER

v.

FIRST UNION CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the court of appeals properly affirmed the dismissal of state-law litigation alleging improprieties related to the acquisition by the private respondents, in a transaction arranged by respondent the Federal Deposit Insurance Corporation, of two insolvent banks that were previously owned by petitioner's bankrupt.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Atherton v. *FDIC*, 117 S. Ct. 666 (1997)	11
City of Hialeah Gardens v. *John L. Adams & Co.*, 599 So. 2d 1322 (Fla. Dist. Ct. App. 1992)	9
FDIC v. *Irwin*, 916 F.2d 1051 (5th Cir. 1990)	10
Leatherman v. *Tarrant County Narcotics Intel. & Coord. Unit*, 507 U.S. 163 (1993)	2
O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994)	6, 10
Title & Trust Co. v. *Parker*, 468 So. 2d 520 (Fla. Dist. Ct. App. 1985)	9
United States v. *Chuang*, 897 F.2d 646 (2d Cir.), cert. denied, 498 U.S. 824 (1990)	9-10
Wheeldin v. *Wheeler*, 373 U.S. 647 (1963)	11
Zamora v. *Columbia Broadcasting System*, 480 F. Supp. 199 (S.D. Fla. 1979)	10

Statutes, regulations and rules:

12 U.S.C. 191	8
12 U.S.C. 248(a)(1)	8
12 U.S.C. 481	8
12 U.S.C. 1820(a)	9
12 U.S.C. 1820(c)	9
12 U.S.C. 1820(c)(3)	8
12 U.S.C. 1821(c)(5)(F)	8
12 U.S.C. 1821(d)(2)(A)(1)	6
12 U.S.C. 1823(c)	8

Statute, regulations and rules—Continued: Page

12 U.S.C. 1844 8
12 C.F.R.:
Section 4.18(b) 9
Section 309.6(c)(3) (1994) 9
Section 309.6(c)(4) (1994) 9
Fed. R. Civ. P.:
Rule 12(b)(6) 2
Rule 24(c) 4

Miscellaneous:

2 F. Harper & F. James, *The Law of Torts* (1956) 10
Restatement (Second) of Contracts (1981) 9
3 S. Speiser, C. Krause & A. Gans, *The American Law of Torts* (1996) 10

In the Supreme Court of the United States

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WILLIAM A. BRANDT, JR., ETC., PETITIONER

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FIRST UNION CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 93 F.3d 750. The opinion of the district court (Pet. App. 6a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1996. A petition for rehearing was denied on November 8, 1996. Pet. App. 16a-17a. The petition for a writ of certiorari was filed on February 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This action arises out of an alleged breach of contract and tortious conduct by respondents First Union Corporation and First Union National Bank, N.A. (collectively, First Union) in their dealings with Southeast Bank, N.A., and Southeast Bank of West Florida (collectively, the Southeast Banks) and the Banks' former holding company, Southeast Banking Corporation (SBC). Pet. App. 18a-19a. First Union acquired certain assets (and assumed certain liabilities) of the Southeast Banks after federal and state regulators placed the Banks into receivership in September, 1991. *Id.* at 31a. Petitioner is SBC's trustee in bankruptcy. *Id.* at 19a.

1. Petitioner's complaint against First Union acknowledges that by March, 1991, the Southeast Banks had suffered widely publicized losses and had a significant portfolio of non-performing loans. Pet. App. 21a.[1] SBC therefore began exploring the possibility of consolidation with another institution. Overtures were made to several possible merger partners, including First Union. *Ibid.*

In March, 1991, SBC and First Union signed an Agreement under which First Union would conduct "due diligence" review of the Banks' financial status in connection with a possible merger. Pet. App. 21a-22a, 25a. The Agreement contained, among other terms, a "standstill" provision that prohibited First Union, for a period of eighteen months, from entering into any discussions, negotiations, arrangements or

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[1] Because the complaint was dismissed under Fed. R. Civ. P. 12(b)(6), the statement of facts is based on the allegations of the complaint. See, *e.g.*, *Leatherman* v. *Tarrant County Narcotics Intel. & Coord. Unit*, 507 U.S. 163, 164 (1993).

understandings with any third party with respect to confidential information obtained about SBC. *Id.* at 23a; see also C.A. R. E., Complaint Exh. A, at 6351943. The Agreement specifically provided, however, that those restrictions would not apply to discussions related to "federally assisted regulatory transactions." Pet. App. 23a; see also C.A. R. E., Complaint Exh. A, at 6351944. The Agreement also prohibited First Union from making "any public disclosure concerning the subject matter of this [agreement] * * * including that information has been provided to you or that you are having or have had discussions or negotiations." *Id.* at 6351994; see also Pet. App. 22a.

The Complaint alleges that First Union used confidential information obtained from the Southeast Banks under the Agreement in meetings with various bank regulators, including the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve (Federal Reserve), and respondent the Federal Deposit Insurance Corporation (FDIC). Pet. App. 23a-31a. First Union allegedly used those discussions to thwart the Banks' efforts to sell various branches and to securitize a portion of their credit card portfolio, and to persuade the regulators to close the Banks so that First Union could purchase their assets for less than it would have had to pay in a transaction negotiated directly with the Banks and SBC. *Id.* at 23a, 28a. The Complaint further alleges that First Union made various public statements prohibited by the Agreement, in an attempt to hasten the collapse of the Southeast Banks by undermining the confidence of depositors. *Id.* at 27a.

In July, 1991, the Southeast Banks began to borrow funds from the Federal Reserve to maintain adequate liquidity. Pet. App. 30a. The following month, the

FDIC began seeking competitive bids for the sale of the banks, and First Union was again allowed to review the banks' records for purposes of preparing a bid. *Ibid.* On September 19, 1991, the Federal Reserve called for immediate repayment of approximately $550 millon in borrowings by the Southeast Banks. *Id.* at 31a. When the Banks were unable to pay, the OCC and Florida bank regulators appointed the FDIC as receiver for the banks. *Ibid.* The FDIC, acting both as receiver and as insurer of the Banks' deposits, then entered into an assistance agreement under which First Union acquired substantially all of the Banks' assets. *Ibid.*

2. Petitioner sued First Union in state court, alleging that First Union's conduct leading up to the closure of the Southeast Banks breached various contractual and other duties owed by First Union under state law. See Pet. App. 33a-50a. First Union removed the action to the United States Bankruptcy Court for the Southern District of Florida. The FDIC, acting in its corporate capacity as provider of deposit insurance, intervened under Fed. R. Civ. P. 24(c). Pet. App. 3a.[2] The reference to the bankruptcy court was later withdrawn, and the action proceeded in the district court.

The district court dismissed all of petitioner's claims. Pet. App. 6a-13a. With respect to all but Count II of the Complaint, the court concluded that

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[2] First Union then filed a third-party complaint against the FDIC seeking indemnification in the event that First Union was found liable to petitioner. The district court struck that complaint on the ground that First Union's agreement with the FDIC did not require indemnification for any act or omission that took place before the regulatory closure of the Southeast Banks.

petitioner lacked standing to sue under state law, because his claims as trustee for SBC were merely derivative of claims belonging to the Southeast Banks, and therefore to the FDIC as receiver. *Id.* at 9a-12a. The court dismissed Count II, which alleged that First Union had breached a duty owed directly to SBC under the "standstill" provision, because it held that all of First Union's communications with federal regulators were permitted under the aforementioned exception to the standstill provision for "federally assisted regulatory transactions." *Id.* at 12a.

The court of appeals affirmed. Pet. App. 1a-5a. In a brief per curiam opinion, the court held that SBC's "injury, if any, was the result of the Comptroller of the Currency's decision to close Southeast Bank." *Id.* at 3a-4a. The court noted petitioner's allegation "that because of First Union's prompting the government officials decided to close the bank[s] sooner than otherwise would have occurred," but it found that "underlying this claim (and throughout [petitioner's] complaint) is [petitioner's] belief that [the] Southeast Bank[s] [were] solvent and should not have been closed by federal regulators." *Id.* at 4a. The court concluded that "[t]he Comptroller's decision [to close the banks] is not an act for which First Union can be held liable" (*ibid.*), and similarly that petitioner could not "sue First Union for 'precipitating' the government's ultimate action by disclosing information the government was entitled to have" (*id.* at 5a).

ARGUMENT

It is undisputed that in 1991 the Southeast Banks had suffered well publicized losses, had a significant portfolio of non-performing loans, and were facing serious liquidity problems. See, *e.g.*, Pet. App. 21a,

30a. Under those circumstances, both SBC and the FDIC—which, as the insurer of the Banks' deposits, had a significant interest in their financial stability—began to discuss with various other parties, including respondent First Union, the possibility of a "merger or other consolidation transaction" involving the Banks. *Id.* at 21a, 24a. Petitioner's original complaint (*id.* at 18a-51a) alleged that First Union breached an agreement with SBC and violated a variety of other state-law duties by engaging in such discussions with the FDIC. The FDIC intervened in the litigation between petitioner and First Union because the outcome had the potential to influence the terms and conditions under which financially sound institutions would be willing to discuss with the FDIC the sort of transactions that the FDIC often seeks to arrange in order to protect the federal deposit insurance fund.[3]

1. The federal interest in this litigation was adequately vindicated when the district court dismissed petitioner's complaint on state-law grounds. Petitioner does not dispute that, under 12 U.S.C. 1821(d)(2)(A)(1), the FDIC has the exclusive right to assert derivative claims on behalf of any institution for which it has been appointed receiver. See Pet. App. 10a; see also *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994). The district court concluded that, as a matter of Florida law, all but one of petitioner's claims as the former sole shareholder of the

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[3] Those transactions include both "open-bank" assistance transactions, which are designed to prevent bank failures, and "closed-bank" transactions, which are designed to resolve bank failures quickly and efficiently and thereby to maintain depositor confidence when insured depository institutions fail.

Southeast Banks were derivative of direct claims belonging to the Banks themselves, and therefore now to the FDIC as receiver. Pet. App. 9a-12a. Similarly, the court dismissed Count II of the complaint, which alleged that First Union breached the "standstill" provision of the Agreement through its various contacts with the FDIC (*id.* at 34a-36a), on the ground that the standstill provision contained an explicit exception for "federally assisted regulatory transactions" of the sort that occurred in this case. *Id.* at 12a; see C.A. R. E., Complaint Exh. A, at 6351943-6351944.

Petitioner has not challenged the district court's fact-bound state-law holdings in this Court (see Pet. i), and they are sufficient to support the judgment below dismissing the Complaint.

2. Petitioner contends (Pet. 7-26) that the court of appeals in this case engaged in "intemperate use of the federal common lawmaking power," creating a "blunt tool" that promises to "cut a wide swath across the judicial landscape." Pet. 25. That argument overreads the court's opinion.

The FDIC argued to the court of appeals that the district court had correctly held petitioner's claims to be derivative (FDIC C.A. Br. 11-15), and that that result was consistent with the federal statutory scheme for orderly resolution of all claims by and against a failed institution (*id.* at 15-17). The FDIC argued further that petitioner could not show that First Union's actions were the "proximate cause" (*id.* at 18) of any harm to SBC, both because federal regulators had an independent right to any confidential information allegedly provided to them by First Union (*id.* at 18-23), and because any harm to SBC as shareholder of the Southeast Banks was caused by

the Banks' insolvency and their closure by the OCC, not by any discussions First Union may have had with the FDIC (*id.* at 23-24).

The court of appeals' decision is consistent with these limited arguments. Petitioner does not contest that the OCC and Florida officials acted properly in closing the Southeast Banks when the Banks were unable to meet their obligations to the Federal Reserve. See 12 U.S.C. 191, 1821(c)(5)(F) (OCC may appoint receiver if it determines that, among other things, an institution cannot "pay its obligations * * * in the normal course of business"). Nor does petitioner contend that the Banks' liquidity problems were caused by First Union's discussions with federal regulators. The court held only that, in the absence of some such allegation, any damage sustained by SBC was ultimately subsumed in the regulatory decision to close the Banks, for which First Union could not be held responsible.

The court also recognized (Pet. App. 5a) that any "confidential" information that First Union might be found to have disclosed to the government would be information to which federal bank regulators were entitled in any event. Both the OCC and the FDIC had a statutory right to possess, on demand, any available information regarding the condition or future prospects of the Banks.[4] That right to

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[4] The OCC is empowered to examine "all the affairs" of national banks. 12 U.S.C. 481. Bank holding companies such as SBC are regulated by the Federal Reserve, which also has broad powers. 12 U.S.C. 248(a)(1), 1844. Similarly, the FDIC is authorized to examine any insured depository institution whenever it determines that a special examination is necessary. 12 U.S.C. 1820(c)(3). The FDIC has also been granted broad authority to take testimony and issue subpoenas in connection

information is critical to the FDIC's ability to discharge its statutory mandate (see 12 U.S.C. 1823(c)) to arrange for the resolution of failed or failing insured depository institutions in an orderly and cost-effective manner. The court of appeals' holding is therefore consistent with the argument, advanced below by both First Union and the FDIC, that any contract provision that would have prevented First Union from discussing the financial condition of the Banks with federal regulators would have been void under Florida law as against public policy. See FDIC C.A. Br. 18-23; First Union C.A. Br. 28-33; *City of Hialeah Gardens* v. *John L Adams & Co.*, 599 So. 2d 1322, 1323-1324 (Fla. Dist. Ct. App. 1992); *Title & Trust Co.* v. *Parker*, 468 So. 2d 520, 524 (Fla. Dist. Ct. App. 1985); Restatement (Second) of Contracts § 178 (1981); cf. *United States* v. *Chuang*, 897 F.2d 646 (2d Cir.) (no expectation of privacy in bank documents

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with "examination of insured depository institutions" regarding "any matter in respect to the affairs or ownership of any such bank or institution or affiliate thereof." 12 U.S.C. 1820(c). Moreover, Congress has provided that the FDIC may, with the consent of the other government body involved, "avail itself of the use of information, services, and facilities" of "any Federal Reserve Bank or of any board, commission, independent establishment, or executive department of the Government." 12 U.S.C. 1820(a). The OCC's regulations contemplate the sharing of information regarding national banks with the FDIC (12 C.F.R. 4.18(b)), in order to assist the FDIC in carrying out its statutory mandate to insure banks and resolve failures. The FDIC has promulgated regulations that facilitate the sharing of information in its possession with the OCC and other federal regulators. 12 C.F.R. 309.6(c)(3) (1994). FDIC regulations require confidential treatment of proprietary commercial or financial information that comes into its possession. 12 C.F.R. 309.6(c)(4) (1994).

where OCC could examine affairs of bank at any time), cert. denied, 498 U.S. 824 (1990). Equally important, the court's observation concerning the government's right to information is consistent with its broader holding that First Union's alleged violations of confidence could not have been the legal cause of bank closures ordered by independent regulatory agencies on the basis of information that those agencies were statutorily entitled to have.

The court of appeals' holding, after full briefing, that petitioner's complaint alleged no actionable causal relationship between First Union's alleged actions and the decision of federal and state regulators to close two failing banks is an application of causation principles common to state tort and contract law.[5] The court's citation of *FDIC* v. *Irwin*, 916 F.2d 1051, 1055 (5th Cir. 1990), does not change that conclusion. *Irwin* held that the OCC's decision to close a bank was generally immune from challenge under the Federal Tort Claims Act. In this case, however, the court's quotation from *Irwin* makes clear that it cited the case only to support its deter-

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[5] Even if petitioner could identify some distinct element of damage that would not have occurred but for First Union's alleged conduct, the court was entitled to conclude that there was no proximate causation under Florida law. Such a determination necessarily involves considerations of public policy. See, *e.g.*, 3 S. Speiser, C. Krause & A. Gans, *The American Law of Torts* § 11:1, at 380-381 (1986), citing *Zamora* v. *Columbia Broadcasting System*, 480 F. Supp. 199, 201 (S.D. Fla. 1979) (applying Florida law); 2 F. Harper & F. James, *The Law of Torts* § 20.4, at 1132 (1956). And in considering the policy of state law, the court could properly take into account the public interests served by free communication with federal, as well as state, banking authorities. Cf. *O'Melveny & Myers* v. *FDIC*, 512 U.S. at 90-91 (concurring opinion).

mination that the OCC's decision to place the Banks in receivership acted as an intervening superseding cause of the ultimate harm to SBC, breaking any chain by which First Union's alleged discussions with the FDIC might otherwise have been linked to some prior (and presumably lesser) harm to SBC as sole stockholder of the Banks. See FDIC C.A. Br. 23 (citing *Irwin*, and the passage quoted by the court, in arguing that the "fundamental problem" with petitioner's case is "the lack of a causative link between the alleged actions of First Union and the alleged harm to the shareholder."). The court's judgment thus rests on familiar state tort and contract law causation principles, not on the announcement of any sweeping new rule of "federal common law."[6]

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[6] If state law were insufficient to protect the federal interest in promoting depositor confidence and assuring the integrity of the nation's financial system, a federal common-law rule of decision in this area might be appropriate. See, *e.g.*, *Atherton* v. *FDIC*, 117 S. Ct. 666, 670 (1997), citing *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963). That issue does not arise so long as state law is adequate to protect the federal interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1997

Supreme Court, U.S.
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No. 96-1245

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAM A. BRANDT, JR., as Trustee of the Chapter 7 Estate of Southeast Banking Corporation,
Petitioner,
v.
FIRST UNION CORPORATION, a North Carolina corporation and FIRST UNION NATIONAL BANK OF FLORIDA, a national banking association, and FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

1. The Eleventh Circuit's Decision is Not an Application of Florida Common Law. 1

2. The Eleventh Circuit Did Not Rule on the Face of the Complaint. 5

3. The Implications of the Eleventh Circuit's Decision. 8

TABLE OF AUTHORITIES

PAGE

CASES

Atherton v. FDIC
519 U.S. ---, 117 S. Ct. 666 (1997) 8, 10

Bosket v. Broward County Housing Authority
676 So. 2d 72 (Fla. Dist. Ct. App. 1996)..... 3, 4

Energy Reserves Group, Inc.
v. Kansas Power & Light Company
459 U.S. 400 (1983).....4

FDIC v. Irwin
916 F.2d 1051 (CA5 1990) 1

Fleming v. Lind-Waldock & Co.
922 F.2d 20 (CA1 1990) 5

McCain v. Florida Power Corporation
593 So. 2d 500 (Fla. 1992).....3

McCoy v. Harsco Corporation
616 So. 2d 1152 (Fla. Dist. Ct. App. 1993).....2

McDonald v. Florida Department of Transportation
655 So. 2d 1164 (Fla. Dist. Ct. App. 1995).....2

Napolitano v. Security First Federal Savings
and Loan Association
533 So. 2d 948 (Fla. Dist. Ct. App. 1988) 2

TABLE OF AUTHORITIES (CONTINUED)

PAGE

CASES

Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency 34 F.3d 753 (CA9 1994) 6

Zamora v. Columbia Broadcasting System 480 F. Supp. 199 (S.D. Fla. 1979) 3

OTHER AUTHORITIES

12 U.S.C. § 161 7

12 U.S.C. § 1820(c) 7

12 U.S.C. § 481 7

12 U.S.C. §§ 248(a)(1).....7

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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1. The Eleventh Circuit's Decision is Not an Application of Florida Common Law.

With some desperation, respondents FDIC and First Union strive to prove to the Court that the Eleventh Circuit did not grant First Union immunity from suit, thereby creating new federal common law. The FDIC tells the Court that the Eleventh Circuit's decision "rests on familiar state tort and contract law causation principles," Brief for the FDIC, p.11, and First Union importunes that the "narrow, fact-specific decision simply did not create any federal common law or any general rule of decision applicable beyond the four corners of Brandt's complaint," Brief for First Union, p.11. The linchpin of both arguments is the notion that the Eleventh Circuit—without citing *any* state precedent or engaging in any discussion whatsoever of Florida law—decided this case on Florida common-law principles, and thus did not inappropriately invoke its federal common-lawmaking powers. As they struggle to dress the decision in new raiment, however, respondents succeed only in further exposing its true nature.

First, there is *no* Florida-law basis for the Eleventh Circuit's ruling. The FDIC offers the strained argument that the court's citation to *FDIC v. Irwin,* 916 F.2d 1051 (CA5 1990)—the *only authority* cited in the Eleventh Circuit's decision—"makes clear that it cited the case only to support its determination that the OCC's decision to place the Banks in receivership acted as an intervening superseding cause of the ultimate harm to SBC," thus breaking the chain of causation. Brief for FDIC, p.10-11.[1]

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[1] Both the FDIC and First Union persist in mischaracterizing petitioner's claims for relief, with the

(continued ...)

The Eleventh Circuit did not cite *Irwin* for this dubious proposition (assuming, however implausibly, that a Fifth Circuit decision addressing the validity of the takeover of a Texas bank under federal statutory law would have been helpful in deciding a question of Florida law), and the court would have been wrong had it done so. Under Florida law, causation *is a question of fact* for resolution by the jury in both tort and breach of contract actions. *E.g., McCain v. Florida Power Corporation,* 593 So. 2d 500, 504 (Fla. 1992); *McDonald v. Florida Department of Transportation,* 655 So. 2d 1164, 1168 (Fla. Dist. Ct. App. 1995); *McCoy v. Harsco Corporation,* 616 So. 2d 1152, 1154 (Fla. Dist. Ct. App. 1993); *Napolitano v. Security First Federal Savings and Loan Association,* 533 So. 2d 948, 950 (Fla. Dist. Ct. App. 1988).

(... continued)
FDIC insisting that the claim was based on "First Union's alleged discussions with the FDIC" and First Union declaring that "the basis of First Union's alleged liability" was "its disclosure of information about the financial condition of Southeast's insolvent banks." Brief for FDIC, p.11; Brief for First Union, p.10. Despite respondents' continued repetition of these inaccurate statements, they remain inaccurate. The complaint alleges tortious acts and breaches of contract that reach back *months before the government takeover* and encompass far more than the discussions between First Union and federal banking regulators, including claims for breach of contract, trade slander (for false and defamatory public statements about Southeast and its subsidiaries), fraud in the inducement, promissory estoppel, and tortious interference with business relationships that are alleged, among other state claims, to have caused harm to Southeast. (App. (App.24a-27a, 33a-50a). Indeed, the Eleventh Circuit's opinion itself acknowledges the broad sweep of the claims, categorizing the Trustee's complaint as alleging that First Union: (1) "[i]ssued 'defamatory' press releases to undermine confidence in Southeast Bank"; (2) "[u]rged lenders to call in outstanding Southeast Bank debt"; and (3) pressured the FDIC to reject other merger proposals, declare Southeast Bank insolvent, and intervene. (App.7a-8a).

This is necessarily the rule where the issue concerns a purported "superseding" or "intervening" cause. Both the FDIC and First Union assert that the Eleventh Circuit merely held, apparently as a matter of law, that the government's takeover of the failed banks was the *sole cause* of any damage to Southeast Bank, thus absolving First Union of any liability for the torts and contractual breaches that occurred prior to the takeover. Brief for FIDC, p.10-11; Brief for First Union, p.10. Under *Florida law,* which the FDIC and First Union intuit was the source of the rules of decision applied (silently, of course) by the Eleventh Circuit, however, "the question of foreseeability as it relates to proximate causation generally *must be left to the factfinder to resolve.*" *McCain v. Florida Power Corporation,* 593 So. 2d 500, 504 (Fla. 1992) (emphasis added). "Whether the *evidence* shows there was an intervening cause relates to the factual question of the defendant's proximate causation and *is to be determined by the factfinder.*" *Bosket v. Broward County Housing Authority,* 676 So. 2d 72, 74 (Fla. Dist. Ct. App. 1996) (emphasis added; citation omitted).[2]

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[2] In a somewhat murky argument, the FDIC asserts that the Eleventh Circuit "was entitled to conclude that there was no proximate causation under Florida law" for reasons "of public policy." Brief for FDIC, p.10 n.5. The *only* Florida-related authority cited by the FDIC for this singular proposition is *Zamora v. Columbia Broadcasting System,* 480 F. Supp. 199 (S.D. Fla. 1979), in which the district court dismissed an action brought by a convicted murderer against three television networks for the dissemination of violent television programs that allegedly had caused him to commit murder. *Id.* at 200-01. Not surprisingly, the district court refused to "create such a wide expansion in the law of torts in Florida." *Id.* at 201-03. In the course of its discussion, the district court remarked that "[t]he questions of duty and proximate cause are, initially at least, questions of law" and that "[i]t becomes essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences," a question that embraces "policy considerations." *Id.* at 201

(continued ...)

Thus, even indulging respondents' assumption that the Eleventh Circuit was applying Florida law without saying so, the court could not have decided "causation" on its own—least of all on a motion to dismiss, with neither facts nor evidence having been adduced. There is simply *no* Florida-law basis for the Eleventh Circuit's decision.

It is particularly ironic that *First Union,* as the accused perpetrator of the tortious acts and contractual breaches, even seeks to invoke the "intervening cause" doctrine—because the essence of the Trustee's claims is that First Union actively strove to secure precisely the result that it now seeks to cast as the "intervening cause." (App.33a-50a). Under Florida law, a defendant may be shielded from liability when "the intervening cause *is completely independent*" of the defendant's misconduct, was "not set in motion" thereby, and was not foreseeable by the defendant. *Bosket v. Broward County Housing Authority,* 676 So. 2d at 74 (emphasis added). Neither the FDIC nor First Union explain how tort law logically can allow a tortfeasor to seek to bring about a particular result and then, upon achieving its triumph and causing the desired damage to the injured party, succeed in the argument that the very forces that were deliberately set into motion constitute an "intervening cause."

(... continued)
(citations omitted). The FDIC mistakenly seizes upon this language, confusing the distinction between *duty* and *proximate cause as a matter of fact. McCain v. Florida Power Corporation,* 593 So. 2d at 502 (proximate cause is "concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred," while "duty" is "a minimal threshold legal requirement for opening the courthouse doors"). If, there is any difference between the rule applied in *Zamora* and that announced in *McCain,* the latter—as the pronouncement of the state's highest court—governs before this Court and the lower federal courts. *E.g., Energy Reserves Group, Inc. v. Kansas Power & Light Company,* 459 U.S. 400, 420 (1983).

In the end, the FDIC and First Union cannot succeed with arguments that depend upon the extraordinary presumption that a federal appellate court undertook to announce a state rule of decision without *any discussion of state law,* or even a whisper of its intention to construe or apply state law in the first instance. There is no legal foundation whatsoever in Florida law for what the Eleventh Circuit did in this case, and absolutely *no* reason to believe that the Eleventh Circuit's decision rests upon unmentioned (and, in actuality, non-existent) principles of Florida law.

2. The Eleventh Circuit Did Not Rule on the Face of the Complaint.

First Union (although not the FDIC) additionally essays an argument that the Eleventh Circuit "conducted a thorough and searching inquiry of Brandt's complaint and determined that Brandt did not, and could not, state a causal connection between the alleged conduct of First Union and its alleged damage." Brief for First Union, p.7-8. The text of the opinion itself defeats this attempt at recreating the decision in a new image.

The Eleventh Circuit recognized the allegations of the complaint that the injuries to Southeast *had been caused* by First Union's pre-seizure breaches of contractual obligations and tortious conduct. (App. 4a). Nonetheless, the Eleventh Circuit ruled that, because Southeast "cannot sue for the discretionary act of federal regulators in closing the bank," it could not bring an action against First Union since "only the Comptroller's final decision" caused injury to Southeast. (App. 4a-5a). It is one thing to say, as do the two cases cited by First Union, that a total failure to *allege* a causal connection between the defendant's conduct and the purported harm may be addressed on a motion to dismiss. *E.g., Fleming v. Lind-Waldock & Co.,* 922 F.2d 20, 24 (CA1 1990) (plaintiff failed to allege facts in support of bare allegation of causation). It is quite another thing to suggest that the Eleventh Circuit could rule—as a matter of *law*, outside the four corners of a complaint that indisputably alleges causation—that, upon the governmental takeover, "no prior act or acts" could have caused damage to Southeast, the precise allegations of the complaint notwithstanding. (App. 4a-5a).

In *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 34 F.3d 753 (CA9 1994), a decision briefly noted in the petition, the court rejected an argument virtually identical to that being made here, *i.e.,* that an "intervening cause" defense, based on a governmental action, may be raised on a motion to dismiss. There, a group of property owners challenged an environmental plan adopted by a regional planning agency in a civil rights action, and their complaint was dismissed upon a ruling that a federal injunction order "had supervened and inflicted the harm." 34 F.3d at 756. Ruling that "a question of causation is preeminently a question of fact, to be decided after trial," the Ninth Circuit held that it had been "premature to hold that [the defendant] inflicted no harm because of the injunction." *Ibid.*

There is thus no legitimate explanation for the Eleventh Circuit's decision to be found in federal procedural law. The face of the decision and governing precedent dictate that the court was not simply engaged in its traditional function of ruling on a dismissal on the pleadings.

Finally, based on the last sentence (App. 5a) in the decision ("[n]or can [Southeast] sue First Union for 'precipitating' the government's ultimate action by disclosing information the government was entitled to have"), First Union and the FDIC conjure an elaborate argument that the Eleventh Circuit had an "alternative basis" for affirming the district court. They assert that "no breach of the alleged duty of confidentiality could have occurred as the government was fully entitled to the allegedly confidential information" as part of the regulatory process. Brief for First Union, pp.12-13; Brief for FDIC, p.8-9.

Respondents thus appear to suggest that there is a basis in federal *substantive* law for the Eleventh Circuit's ruling. Even if they are correct, of course, their argument would not support a dismissal of Southeast's complaint which, as noted earlier, see n.1, *supra,* alleges torts and breaches of contract by First Union that extend far beyond First Union's discussions with federal banking regulators. No statute, and certainly none cited by the FDIC and First Union, supports an argument that enforcement of the

confidentiality agreement violates public policy. The relevant statutes can be invoked to require a bank to comply with a governmental request to provide information about itself.[3] They create, however, no *affirmative duty* in a distinct private entity to connive a method of obtaining access to confidential information and to thereafter approach federal regulators with that information.

No statutory provision is identified under which a party such as First Union is barred from contracting away whatever privilege it might otherwise have had to speak with federal regulators in exchange for the right to inspect privileged and confidential information, to which it would never have had access absent the confidentiality agreement. Certainly, no statute immunizes from liability one who deliberately tells malicious untruths in an effort to gain control over a rival bank, *as First Union is alleged in the complaint to have done.* (App.18a, 24a-27a).[4]

Without *any* statutory basis, the FDIC would impliedly preempt state enforcement of the confidentiality

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[3] See 12 U.S.C. § 481 (authorizing OCC to examine national banks as deemed necessary); 12 U.S.C. § 161 (requiring national banks to submit periodic reports to the OCC and authorizing the OCC to request supplemental information); 12 U.S.C. §§ 248(a)(1), 1844 (Federal Reserve may examine records of national banks); 12 U.S.C. § 1820(c) (FDIC may examine records of insured depositories and may issue subpoenas for testimony).

[4] The FDIC cannot seriously assert that *anything* one bank tells a federal regulator about another bank—regardless of the content of the statement, its veracity, the intent of the maker of the statement and the information conveyed—is absolutely privileged in a private cause of action. Under this formulation, one bank's malicious accusation to regulators that a rival bank is engaged in pervasive money-laundering would, for example, give rise to no right of action. Certainly, if the Eleventh Circuit had intended to announce such a sweeping rule, some additional discussion would appear in its decision.

agreement as a matter of *federal common law*—a rule as beyond the scope of the federal common-lawmaking power as the Eleventh Circuit's conferral of immunity upon First Union. Thus, far from establishing the "independent grounds for affirmance" urged by First Union, Brief for First Union, p. 12-13, the "alternative" holding only serves further to illustrate the extraordinary departure from the traditional limitations on federal common-lawmaking and the utter incompatibility of the decision with the stringent limitations that this Court reaffirmed in *Atherton v. FDIC,* 519 U.S. ---, 117 S. Ct. 666 (1997).

3. The Implications of the Eleventh Circuit's Decision.

In the end, both the FDIC and First Union are seeking to minimize the impact and import of a *ratio decidendi* that they neither sought with any particular vigor nor defend with noticeable zeal. As previously discussed, the FDIC asks the Court to treat the decision as an application of state tort and contract law. Brief for FDIC, p.11.[5] For its part, First Union suggests that certiorari

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[5] Continuing to cast about for another explanation, First Union and the FDIC note that the district court did not dismiss the complaint on the grounds used by the Eleventh Circuit. Brief for First Union, p.8 n.4; Brief for FDIC, p.6-7. This is correct—as is set forth in detail in the Petition at p.4-5—but the point is obscure, at best. The overriding criterion for certiorari, regardless of the particular ground asserted by the petitioner, is what the lower court actually decided; here, petitioner claims that the Eleventh Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court," S. Ct. Rule 10(c), and that the decision contravenes the principles recently reaffirmed in *Atherton v. FDIC.* While Brandt vigorously challenged the district court's ruling before the Eleventh Circuit, that court elected not to pass on, or even to discuss, that issue; the question before this Court arises from the Eleventh Circuit's *holding* in the case, the portent of which cannot be diminished by reference to the district court's ruling. When bank

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should not be granted because the Eleventh Circuit merely "settled a dispute arising between two private litigants," Brief for First Union, p.8, a depiction so misguided as to provide yet further confirmation of the need for this Court's intervention.

This case began its life as "a dispute arising between two private litigants"—in Florida state court. Had the matter been left to the state courts to resolve between Southeast and First Union, it indeed would have been a "dispute arising between two private litigants," to be resolved under traditional state-law tort and contract principles. The FDIC, however, intervened and removed the action to federal court, at which point the matter inevitably and inalterably lost its "private" character and became a dispute over the impact of government intervention on state-law causes of action.

With the advent of the Eleventh Circuit's decision, this case squarely presents important issues of the relationship between federal common law and state-law rights and obligations—issues that are hardly the stuff of ordinary disputes between private citizens. The Eleventh Circuit's decision hinges on the effect of the FDIC's intervention on state-law claims. Respondents' arguments on the scope of governmental power would be completely irrelevant if this were a *true* "dispute arising between two private litigants." Important questions concerning federal-state relations, the rights of citizens to bring state-law actions, and the lawmaking powers of the federal courts are at the core of this case.

With their attempted rationalizations stripped away, neither respondent has a doctrinally-sound rejoinder to the petition. There is neither a state law basis nor a federal

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(... continued)
officials, legal advisors, judges, or would-be predators look at the Eleventh Circuit's published decision in this case, they will read—and act upon—the words in the opinion, and not those of the district court's order or the *post hoc* excuses being offered by the FDIC and First Union. That is where the danger lies.

statutory basis for the Eleventh Circuit's decision; by process of elimination, the rule of decision is one of *federal common law*. Whether the Eleventh Circuit's ruling is most aptly characterized as a conferral of federal common-law "immunity," as asserted by petitioner, or as announcing a new federal common-law rule of "no causation as a matter of law" after a government takeover, as argued by respondents, the result is the same. The Eleventh Circuit has announced a rule of federal common law in the utter absence of *any* basis therefor, and in direct conflict with the prerequisites for the creation of federal common law reaffirmed by this Court in *Atherton v. FDIC*, 519 U.S. ---, 117 S. Ct. 666 (1997). It is the ramifications of such an unchecked exercise of the federal common-law power to which the petition speaks—and neither the FDIC nor First Union has offered an answer.

Respectfully submitted,

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